

(29,021)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 72.

CANUTE STEAMSHIP COMPANY, LTD., AND COMPANIA
NAVIERA SOTA Y AZNAR, PETITIONERS,

v.s.

PITTSBURGH AND WEST VIRGINIA COAL COMPANY
ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

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PETITION.
(Petition to have Diamond Fuel Company
Declared a Bankrupt.)

1

IN THE
United States District Court

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

PITTSBURGH & WEST VIRGINIA
COAL COMPANY, corporation,
H. M. CRAWFORD COAL COM-
PANY, corporation, and HER-
MAN J. POLING and HERBERT
S. HALLER, partners, trading
and doing business as the
BOULDER COAL COMPANY,

2

against

DIAMOND FUEL COMPANY, a cor-
poration,
Alleged Bankrupt.

3

TO THE HONORABLE JUDGE OF THE DISTRICT COURT
OF THE UNITED STATES FOR THE SOUTHERN
DISTRICT OF NEW YORK.

The petition of the Pittsburgh and West Vir-
ginia Coal Company, a corporation organ-

Petition.

ized under the laws of the State of Pennsylvania, and of the State of Pennsylvania: the H. M. Crawford Coal Company, a corporation organized under the laws of the State of West Virginia, and of the State of West Virginia; and Herman J. Poling and Herbert S. Haller, co-partners trading and doing business as the Boulder Coal Company, under the laws of the State of West Virginia, and of West Virginia, respectfully shows:

5

That the Diamond Fuel Company is a corporation organized under the laws of the State of Delaware, and has for the greater portion of the six months next preceding the date of filing this petition, had its principal place of business and 23 West 34th Street, at the City of New York, in the County of New York, in the said Southern District, and that it is engaged principally in trading and mercantile pursuits.

6

That the said Diamond Fuel Company owes debts to the amount of \$1000 and over, is insolvent, and is neither a wage earner nor a person engaged principally in farming or the tilling of the soil.

That your petitioners are creditors of the said Diamond Fuel Company, having provable claims against it, which amounts, in the aggregate, are in excess of the value of securities held by them to the amount of more than \$500. and that neither of your petitioners is entitled to priority of payment of their said claims within the meaning of section 64-b of the Bankruptcy Law of 1898, nor has either of your petitioners received a

Petition.

7

preference within the meaning of section 60-a-b of said law as amended;

That the nature and amount of your petitioners' claims and the securities held by them, if any, are as follows:

The claim of petitioner, the Pittsburgh & West Virginia Coal Company is for \$8,225.10 for 18 cars of coal sold and delivered to the said Diamond Fuel Company on or about the 30th day of October, 1920; the claim of petitioner the H. M. Crawford Coal Company, is for \$1653, for 5 cars of coal sold and delivered to the said Diamond Fuel Company on or about the 1st day of November, 1920; and that the claim of the petitioner, the Boulder Coal Company is for \$3544.33 for cars of coal sold and delivered to the Diamond Fuel Company on or about the 30th day of October, 1920. 8

That your petitioners, nor neither of them, held any security for their said debts whatsoever.

That within four months next preceding the date of filing this petition, to wit, on the 27th day of November, 1920, the said Diamond Fuel Company, while insolvent, committed an act of bankruptcy, in that it did, on the said 27th day of November, 1920, pay to one Charles S. Chestnut, of the City of Philadelphia, his heirs and assigns, valuable parcels of land, coal in fee, mining plant equipment, machinery, merchandise and all personal property owned by it, the said Diamond Fuel Company, in Barbour County State of West Virginia of the value of \$100,000, as near 9

as petitioners can estimate the same, and that the cash received in consideration of the sale of the said lands, coal in fee, mining plant equipment, etc., was paid to Seaboard Coal & Coke Company, Seaboard Fuel Company, Gordon B. Late, trading as the Gordon B. Late Coal Company and S. J. Livingston, and divers other persons and corporations unknown to your petitioners, who were creditors of the said Diamond Fuel Company at and before said sale, leaving the said claims of your petitioners and divers
11 other creditors wholly unpaid, thus preferring the claims of the said Seaboard Coal & Coke Company, Seaboard Fuel Company, Gordon B. Late, trading as Gordon B. Late Coal Company, S. J. Livingston and divers other creditors, over the claims of your petitioners and divers other creditors.

That the said conveyance so made by the said Diamond Fuel Company was made with the intent to create a preference of the claims of the said Seaboard Coal & Coke Company, Seaboard Fuel Company, Gordon B. Late, trading as Gordon B. Late Coal Company, S. J. Livingston and
12 divers other creditors, whose names are to your petitioners unknown, over the claims of your petitioners and divers other creditors of the same class.

WHEREFORE your petitioners pray that service of this petition, with a subpoena in bankruptcy be made upon the Diamond Fuel Company, as provided by said Bankruptcy Law of 1898 as amended; and that the said Diamond Fuel Com-

Petition

13

pany may be adjudged bankrupt within the pur-
view of such act.

PITTSBURGH & WEST VIRGINIA COAL CO.,
by Thos. F. Barrett,
Vice President.

H. M. CRAWFORD COAL COMPANY,
by H. M. Crawford,
President.

BOULDER COAL COMPANY (co-partnership),
by H. J. Poling,
A Member of the co-partnership.

NASH ROCKWOOD,
Attorney for Petitioners,
Office & P. O. Address,
527 5th Avenue,
New York City.

15

IN THE
DISTRICT COURT OF THE UNITED
STATES AT _____

IN THE _____ DISTRICT OF _____

State of West Virginia, }
County of Harrison, } ss. :

17 PITTSBURGH AND WEST VIRGINIA
COAL COMPANY, a corporation,
etc.

H. M. CRAWFORD COAL COMPANY,
a copartnership in Bankrupt-
cy,

VS.

18 DIAMOND FUEL COMPANY, a cor-
poration, etc.,
Alleged Bankrupt.

Herman J. Poling, Herbert M. Crawford and Thos. F. Barrett this day personally appeared before the undersigned and said Thos. F. Barrett made solemn oath that he is Vice President of the Pittsburgh and West Virginia Coal Company, one of the petitioners mentioned and described in the foregoing petition; and said Herb-

Petition

19

ert M. Crawford made solemn oath that he is President of the petitioning creditors mentioned and described in the foregoing petition; and said Herman J. Poling made solemn oath that he is one of the partners of the firm trading as the Boulder Coal Company, one of the petitioning creditors mentioned and described in said petition and do hereby severally make oath that the statements of fact contained in the foregoing petition are according to the best of their knowledge, information and belief.

20

HERMAN J. POLING,
HERBERT M. CRAWFORD,
THOS. F. BARRETT.

Subscribed and sworn to before me this
23rd day of February A. D., 1921.

PAUL E. REUTTER,
Notary Public.

21

22

Petition.

State of West Virginia, }
 Harrison County, } ss.:

23 I, CLAIR N. PARRISH, Clerk of the County Court of Harrison County, the same being a Court of Record, hereby Certify that Paul E. Reutter before whom the annexed affidavit was taken, and whose name is subscribed thereto, was at the time of so doing a Notary Public, in and for Harrison County, West Virginia, duly commissioned and qualified, and duly authorized to administer oaths and take acknowledgements; that his commission was dated on the 3rd day of February, 1916, and will expire on the 3rd day of February, 1926. I further certify that I am well acquainted with the handwriting of said Notary and verily believe the signature to be his genuine signature.

24 In Testimony Whereof, I have hereto set my hand and affixed the seal of said Court at the City of Clarksburg, this 23rd day of February, 1921.

(Signed) CLAIR N. PARRISH,
 (Seal) Clerk.

ANSWER.
(Answer of Alleged Bankrupt.)

UNITED STATES DISTRICT COURT,
 FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

PITTSBURGH & WEST VIRGINIA
 COAL COMPANY, corporation,
 H. M. CRAWFORD COAL COM-
 PANY, corporation, HER-
 MAN J. POLING and HERBERT
 S. HALLER, partners, trading
 and doing business as the
 BOULDER COAL COMPANY,

against

DIAMOND FUEL COMPANY, a cor-
 poration,
 Alleged Bankrupt.

In
 Bankruptcy.

26

27

Now comes the Diamond Fuel Company, a corporation, the person against whom a petition for adjudication in bankruptcy has been filed herein, and does controvert such petition and file the following answer.

I. Denies that it is insolvent as alleged in said petition.

28

Answer.

II. Denies that it has committed an act of bankruptcy as alleged in the petition, but on the contrary alleges the facts to be as follows:

That on or about the 27th day of November, 1920, the Diamond Fuel Company was not insolvent and that any transfer of property was made for a good and valuable consideration, and that creditors who were paid with money realized from the sale of said property were not preferred within the meaning of the Bankruptcy Act and that said conveyance was not made with the intent to create a preference.

29

III. Denies that the Pittsburgh & West Virginia Coal Company, the principal petitioning creditor herein, has a provable claim against the Diamond Fuel Company, but on the contrary alleges that the Diamond Fuel Company does not owe the Pittsburgh & West Virginia Coal Company the sum of \$8225.10 for 18 cars of coal, and further alleges that the Diamond Fuel Company does not owe the Pittsburgh & West Virginia Coal Company any amount whatsoever.

30

Wherefore the Diamond Fuel Company avers that it should not be adjudged bankrupt for any acts in said petition alleged and prays a hearing thereon and that the petition herein be dismissed with costs.

DIAMOND FUEL COMPANY,
Alleged Bankrupt.

FRANK E. STRIPE,
Attorney for Alleged Bankrupt,
220 Broadway,
New York City.

State of New York,
County of New York, ss.:

GARDNER YERKES, being duly sworn, says:

That he is Secretary and Treasurer of the Diamond Fuel Company, the alleged bankrupt above named, a corporation organized and existing under the laws of the State of Delaware, and that he has read, and knows the contents of the foregoing answer, and that the same is true to his own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

32

GARDNER YERKES.

Sworn to before me this
3rd day of March, 1921.

HAROLD A. COBAN,

Notary Public, Kings Co.

County Clerk's No. 148.

Certificate filed in New York Co. No. 308.

Commission expires March 30, 1922.

33

34

**INTERVENING PETITION OF JAMES E. LAW
AND ANTHONY F. McCUE AND
MORGANTOWN COAL CO.**

**(Petition and Notice of Motion, Filed
Sept. 14, 1921.)**

IN THE .

DISTRICT COURT OF THE UNITED
STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

35

In the Matter

of

DIAMOND FUEL COMPANY,
a Corporation,
Alleged Bankrupt.

No. 29329.

36

TO THE HONORABLE MARTIN T. MANTON, JUDGE OF
THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

The petition of James E. Law and Anthony F. McCue, partners in the practice of law with their residence at Clarksburg, West Virginia, and the Morgantown Coal Company, a corporation organized under the laws of the State of West Virginia, and of the State of West Virginia, with its principal office and place of business at Mor-

Intervening Petition of James E. Law, et al. 37

gantown in the State of West Virginia, respectfully allege and show:

(1) That your petitioners James E. Law and Anthony F. McCue, engaged in the practice of law as Law & McCue, are creditors of the above-named Diamond Fuel Company, a corporation, having a provable claim against the same amounting to \$2,742.50 in excess of securities held by them. That the nature and amount of such petitioners' claim is for legal service and advice rendered by said James E. Law and Anthony F. McCue, as such partners, from August 8th, 1918, to September 29, 1920, inclusive, and that no part of such claim has been paid, although duly demanded. 38

(2) That your petitioner, Morgantown Coal Company, a corporation, is a creditor of the above-named Diamond Fuel Company, having a provable claim against the same amounting to \$1,698.32 in excess of securities held by it. That the nature and amount of such petitioner's claim is for balance due for coal sold by the petitioner, Morgantown Coal Company, to the Diamond Fuel Company, with interest charged thereon to July 1st, 1921, and that no part of said claim has been paid, although duly demanded. 39

(3) That all such claims were provable and held by the respective petitioners at the time of the act of bankruptcy alleged in the original petition and at the time of filing the original petition herein.

40 *Intervening Petition of James E. Law, et al.*

(4) That on or about the 25th day of February, 1921, the Pittsburgh & West Virginia Coal Company, a corporation, the H. L. Crawford Coal Company, a corporation, and Herman J. Poling and Herman S. Haller, co-partners trading and doing business as the Boulder Coal Company, filed in the office of this Court a petition that Diamond Fuel Company, a corporation, be adjudged an involuntary bankrupt. That the said petition is still pending and no adjudication has been had thereon, and that your petitioners
41 desire to join in the petition of the said Pittsburgh and West Virginia Coal Company, and others, that the said Diamond Fuel Company may be adjudged an involuntary bankrupt.

Whereupon your petitioners would respectfully pray that they be allowed to join in said petition of the Pittsburgh & West Virginia Coal Company, and others, that the said Diamond Fuel Company be adjudged a bankrupt within the purview of the Bankruptcy Act of 1898, and the amendments thereof.

42

JAMES E. LAW,

ANTHONY F. McCUE,

Partners in the practice of law under
the firm name of Law & McCue.

MORGANTOWN COAL COMPANY,

By G. B. HARTLEY,

Its President.

STETSON, JENNINGS & RUSSELL, Attorneys,

15 Broad St., New York.

LAW & McCUE,

Attorneys for Petitioners,

Office, 518-520 Goff Building,

Clarksburg, West Virginia.

Intervening Petition of James E. Law, et al. 43

VERIFICATION.

State of West Virginia,
County of Harrison, to wit:

This day came JAMES E. LAW and ANTHONY F. McCUE, in person before the undersigned, a Notary Public in and for said County of Harrison, State of West Virginia, and after being by me first duly sworn, they and each of them did depose and say and hereby severally make oath 44
that they are of the petitioners mentioned and described in the foregoing petition, and that the statements, allegations and facts contained in the foregoing petition are true.

JAMES E. LAW.

ANTHONY F. McCUE.

Taken, subscribed and sworn to before me,
this the 19th day of July, 1921.

WILLIAM F. WALTERS,
Notary Public,

45

My commission expires on the 25th day of August, 1929.

(Seal)

46 *Intervening Petition of James E. Law, et al.*

State of West Virginia,
County of Harrison, to-wit:

47 This day came G. B. HARTLEY in person before the undersigned, a Notary Public in and for said County, State of West Virginia, and after being by me first duly sworn, made oath and says that he is the President of the Morgantown Coal Company, a corporation, incorporated by and under the laws of the State of West Virginia, carrying on business in Morgantown, Monongalia County, State of West Virginia, and one of the petitioners named in the foregoing petition, and that the statements, allegations and facts contained in the foregoing petition are true.

G. B. HARTLEY.

Taken, subscribed and sworn to before me,
this 25th day of July, 1921.

48 SAMUEL LIEPER,
Notary Public.

My commission expires on the 11th day of
October, 1930.

(Seal)

**ORDER GRANTING LEAVE TO JAMES E. LAW
AND ANTHONY F. McCUE AND MORGAN-
TOWN COAL CO. TO INTERVENE.**

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court Room thereof, in the Post Office Building in the Borough of Manhattan, City of New York, on the 19th day of September, 1921.

50

Present:

HON. CHARLES M. HOUGH,

United States Circuit Judge.

IN THE MATTER

of the

DIAMOND FUEL COMPANY,

a Corporation,

Alleged Bankrupt.

51

On reading and filing the notice of motion, with due proof of service upon the attorneys for the receiver and the original petitioning creditors herein, for an order allowing James E. Law and Anthony F. McCue, copartners, and the Morgantown Coal Co. to intervene herein and be joined and made petitioning creditors, praying

52

Order Granting Leave to Intervene.

for the adjudication in bankruptcy of the above-named alleged bankrupt, and upon the petition of said James E. Law, Anthony F. McCue and Morgantown Coal Co., verified July 19, 1921, annexed thereto, and upon the involuntary petition and all the proceedings heretofore had herein, and said motion having regularly come on to be heard and counsel for the intervening creditors appearing in support of said motion, and no one appearing in opposition thereto, and due deliberation
53 having been had thereon;

Now on motion of Stetson, Jennings & Russell, attorneys for the intervening creditors, it is

ORDERED, ADJUDGED AND DECREED that the motion hereby be, and the same hereby is, in all respects granted; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that said James E. Law and Anthony F. McCue, co-partners, and the Morgantown Coal Co. be, and they hereby are, granted leave and allowed to intervene herein, and are hereby joined and made
54 petitioning creditors in the petition for the involuntary adjudication of the Diamond Fuel Company, heretofore filed in the Office of the Clerk of the District Court of the United States, for the Southern District of New York, on the 25th day of February, 1921.

C. M. HOUGH,
C. J.

ORDER GRANTING APPLICATION OF CANUTE STEAMSHIP COMPANY, LTD., AND COMPAÑIA NAVIERA SOTA Y AZNAR TO APPEAR AND ANSWER PETITION FILED FEBRUARY 25, 1921.

At a Stated Term of the United States District Court, held in and for the Southern District of New York, at the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 10th day of October, 1921. 56

Present:

Honorable JULIUS M. MAYER,

District Judge.

IN THE MATTER

of

DIAMOND FUEL COMPANY,
Alleged Bankrupt.

In Bankruptcy
No. 29239.

57

Canute Steamship Company, Ltd., and Compañia Naviera Sota y Aznar, creditors of the alleged bankrupt, having made application to this Court at a Stated Term thereof for the hearing of motions, on the 3rd day of October, 1921, for an order permitting the said Canute Steamship

58 *Order Granting Application of Canute Steamship Company, Ltd.*

Company, Ltd., and Compania Naviera Sota y Aznar to appear in this cause and file an answer to the petition in bankruptcy filed herein on or about the 25th day of February, 1921, by three alleged creditors of the said alleged bankrupt; and the said application having duly come on to be heard at the same time and place, and the said creditors having duly appeared by Kirlin, Woolsey, Campbell, Hickox & Keating, their attorneys, no one appearing in opposition thereto,

59

Now on reading and filing notice of said application and the affidavit of Delbert M. Tibbetts, verified the 29th day of September, 1921, thereto annexed, and the answer of the said creditors, verified the 28th day of September, 1921, thereto annexed; and proof of due service thereof on the attorneys for the respective parties herein; it is

ORDERED that the said application be and the same hereby is in all respects granted and that Canute Steamship Company, Ltd. and Compania Naviera Sota y Aznar be and they hereby are

60

authorized to file an answer to the petition filed herein against the alleged bankrupt on or about the 25th day of February, 1921, without prejudice to any and all proceedings heretofore had herein; and it is further

ORDERED that the answer of the said creditors, verified the 28th day of September, 1921, and annexed to and filed with the moving papers on this application be and the same hereby is accepted as the answer of said creditors to the said petition.

JULIUS M. MAYER,
U. S. D. J.

**NOTICE OF APPEARANCE FOR CANUTE
STEAMSHIP COMPANY, LTD. AND COM-
PANIA NAVIERA SOTA Y AZNAR, FILED
SEPTEMBER 30, 1921.**

DISTRICT COURT OF THE UNITED
STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF

of

DIAMOND FUEL COMPANY,
Alleged Bankrupt.

TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

The Clerk of this Court will please enter our
appearance as attorneys for Canute Steamship
Company, Ltd., and Compania Naviera Sota y
Aznar, creditors of the alleged bankrupt, who
desire to plead herein in response to the petition
of Pittsburgh & West Virginia Coal Company,
H. M. Crawford Coal Company and Herman J.
Poling and Herbert S. Haller, partners doing
business under the name of Boulder Coal Com-
pany, and to the intervening petition of James

64 *Notice of Appearance for Canute Steamship
Company Company, Ltd.*

E. Law and Anthony S. McCue, partners under the firm name and style of Law & McCue, and the Morgantown Coal Company that the said Diamond Fuel Company be adjudicated bankrupt.

Dated, New York, September 30, 1921.

65 KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Attorneys for Canute Steamship Company
and Compania Naviera Sota y Aznar.

**ANSWER OF ANSWERING CREDITORS TO
PETITION, FILED FEBRUARY 25, 1921.**

DISTRICT COURT OF THE UNITED
STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

DIAMOND FUEL COMPANY,
Alleged Bankrupt.

29,239.

68

Answer to petition in bankruptcy, filed by Pittsburgh & West Virginia Coal Company, a corporation, H. M. Crawford Coal Company, a corporation, Herman J. Poling and Herbert S. Haller, partners, doing business under the name of Boulder Coal Company.

Canute Steamship Company, Ltd., and Compania Naviera Sota y Aznar, creditors of the Diamond Fuel Company, alleged bankrupt, by their attorneys, Kirlin, Woolsey, Campbell, Hickox & Keating, for answer to the petition in bankruptcy filed herein on or about the 25th day of February, 1921, allege on information and belief as follows:

1. The Canute Steamship Company, Ltd., is a corporation organized and existing under and

69

70 *Answer of Answering Creditors to Petition.*

pursuant to the laws of the Kingdom of Great Britain and Ireland, and the Compania Naviera Sota y Aznar is a corporation duly organized and existing under the laws of the Kingdom of Spain. They are creditors of the Diamond Fuel Company, the alleged bankrupt herein, having provable claims against said alleged bankrupt.

2. They deny that the Diamond Fuel Company, alleged bankrupt, is insolvent.

- 71 3. They deny that said alleged bankrupt has committed an act of bankruptcy as alleged in the petition in bankruptcy herein, but on the contrary, allege the facts to be as follows:

On or about the 27th day of November, 1920, Diamond Fuel Company was not insolvent and any transfer of property made by it was made for a good and valuable consideration and any creditors who were paid money realized from the sale of said property were not preferred, and said conveyance was not made with the intention of creating a preference.

72

4. They deny that the Pittsburgh & West Virginia Coal Company, one of the petitioning creditors herein, has a provable claim against the alleged bankrupt, but allege on the contrary, that said alleged bankrupt does not owe Pittsburgh & West Virginia Coal Company in any sum whatsoever.

Answer of Answering Creditors to Petition. 73

WHEREFORE, these creditors respectfully pray that a hearing be granted on the issues herein made, and that on consideration thereof, the petition in bankruptcy be dismissed with costs.

CANUTE STEAMSHIP COMPANY, LTD.,
COMPANIA NAVIERA SOTA Y AZNAR,
Creditors.

By
KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,

74

75

76 *Answer of Answering Creditors to Petition.*

State of New York, |
 County of New York, } ss.:
 City of New York, |

77 I, P. C. A. VAN KRIEKEN, general manager for Sota and Aznar, managing owners of Compañia Naviera Sota y Aznar, one of the answering creditors mentioned and described in the foregoing answer, do hereby make solemn oath that the said facts therein contained are true to the best of my knowledge, information and belief.

The sources of my information and the grounds for my belief as to those matters set forth in said answer upon information and belief consist of the allegations of the answer filed in this cause by the alleged bankrupt, and statements reported to me as having been made by representatives of the alleged bankrupt to the attorneys for the answering creditors herein.

78 P. C. A. VAN KRIEKEN.

Subscribed and sworn to before me this
 28th day of September, 1921.

HARRY D. THIRKIELD,
 Notary Public.

Answer of Answering Creditors to Petition.

79

State of New York,]
 County of New York, }ss.:
 City of New York,]

I, DELBERT M. TIBBETTS, one of the attorneys for the Canute Steamship Company, Ltd., one of the answering creditors mentioned and described in the foregoing answer, do hereby make solemn oath that the said facts therein contained are true to the best of my knowledge, information and belief.

80

The sources of my information and the grounds for my belief as to those matters set forth in said answer upon information and belief consist of the allegations of the answer filed in this cause by the alleged bankrupt, and statements made to me and other attorneys for answering creditors by representatives of the alleged bankrupt.

The reason this verification is not made by the Canute Steamship Company, Ltd., or one of its officers, is that it is a non-resident corporation, and that it has no officer or authorized agent in the City of New York or elsewhere within the jurisdiction of this court who has knowledge of the allegations contained in the foregoing answer.

81

DELBERT M. TIBBETTS.

Subscribed and sworn to before me, this
 29th day of September, 1921.

HARRY D. THIRKIELD,
 Notary Public.

82

**ANSWER OF ANSWERING CREDITORS TO
INTERVENING PETITION OF JAMES E. LAW
AND ANTHONY F. McCUE ET ANO.**

**DISTRICT COURT OF THE UNITED
STATES,**

FOR THE SOUTHERN DISTRICT OF NEW YORK.

83

IN THE MATTER

of

DIAMOND FUEL COMPANY,

Alleged Bankrupt.

84

Answer of Canute Steamship Company, Ltd., and Compania Naviera Sota y Aznar to the intervening petition of James E. Law and Anthony S. McCue, partners under the firm name and style of Law & McCue, and the Morgantown Coal Company, a corporation.

Canute Steamship Company, Ltd., and Compania Naviera Sota y Aznar, creditors of the Diamond Fuel Company, alleged bankrupt, by their attorneys, Kirlin, Woolsey, Campbell, Hickox & Keating, for answer to the intervening petition permitted to be filed herein by an order of this court dated the 19th day of September, 1921, by James E. Law and Anthony F. McCue, partners, under the firm name and style of Law

Answer of Answering Creditors to Intervening 85
Petition.

& McCue, and the Morgantown Coal Company, a corporation, allege on information and belief as follows:

1. The Canute Steamship Company, Ltd., is a corporation organized and existing under and pursuant to the laws of the Kingdom of Great Britain and Ireland, and the Compania Naviera Sota y Aznar is a corporation duly organized and existing under the laws of the Kingdom of Spain. They are creditors of the Diamond Fuel Company, the alleged bankrupt herein, having provable claims against said alleged bankrupt. 86

2. They deny that the Diamond Fuel Company, alleged bankrupt, is insolvent.

3. They deny that said alleged bankrupt has committed an act of bankruptcy as alleged in the petition and intervening petition herein, but on the contrary, allege the facts to be as follows:

On or about the 27th day of November, 1920, Diamond Fuel Company was not insolvent and any transfer of property made by it was made for a good and valuable consideration and any creditors who were paid money realized from the sale of said property were not preferred, and said conveyance was not made with the intention of creating a preference. 87

They further deny that the alleged bankrupt committed an act of bankruptcy within

88 *Answer of Answering Creditors to Intervening Petition.*

four months prior to the filing of said intervening petition.

4. They deny that the intervening petitioners herein or either of them have provable claims against the alleged bankrupt, and allege that the alleged bankrupt does not owe said intervening petitioners any sum whatsoever.

89 WHEREFORE, these creditors respectfully pray that a hearing be granted on the issues herein made, and that on consideration thereof, the petition and intervening petition in bankruptcy be dismissed with costs.

COMPANIA NAVIERA SOTA Y AZNAR,
CANUTE STEAMSHIP COMPANY, LTD.,
Creditors.

By
KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Their Attorneys.

*Answer of Answering Creditors to Intervening
Petition.* 91

State of New York,)
County of New York, }ss.:
City of New York,)

I, P. C. A. VAN KRIEKEN, general manager in New York for Sota and Aznar, managing owners of Compania Naviera Sota y Aznar, one of the answering creditors mentioned and described in the foregoing answer, do hereby make solemn oath that the said facts therein contained are true to the best of my knowledge, information and belief. 92

The sources of my information and the grounds for my belief as to those matters set forth in said answer upon information and belief consist of the allegations of the answer filed in this cause by the alleged bankrupt, and statements reported to me as having been made by representatives of the alleged bankrupt to the attorneys for the answering creditors herein.

P. C. A. VAN KRIEKEN. 93

Subscribed and sworn to before me this
28th day of September, 1921.

HARRY D. THIRKFIELD,
Notary Public.

94 *Answer of Answering Creditors to Intervening
Petition.*

State of New York, }
County of New York, }ss.:
City of New York, }

I, DELBERT M. TIBBETTS, one of the attorneys
for the Canute Steamship Company, Ltd., one
of the answering creditors mentioned and de-
scribed in the foregoing answer, do hereby make
solemn oath that the said facts therein contained
95 are true to the best of my knowledge, informa-
tion and belief.

The sources of my information and the
grounds for my belief as to those matters set
forth in said answer upon information and belief
consist of the allegations of the answer filed in
this cause by the alleged bankrupt, and state-
ments made to me and other attorneys for an-
swering creditors by representatives of the al-
leged bankrupt.

The reason this verification is not made by the
Canute Steamship Company, Ltd., or one of its
96 officers, is that it is a non-resident corporation,
and that it has no officer or authorized agent in
the City of New York or elsewhere within the
jurisdiction of this court who has knowledge of
the allegations contained in the foregoing answer.

DELBERT M. TIBBETTS.

Subscribed and sworn to before me this
29th day of September, 1921.

HARRY D. THIRKIELD,
Notary Public.

**BILL OF PARTICULARS OF PETITIONING
CREDITORS.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

DIAMOND FUEL COMPANY,
Alleged Bankrupt.

In Bankruptcy
No. 29, 239.
Bill of
Particulars.

98

The petitioning creditors herein for Bill of Particulars, allege:

That the shipment of coal from Pittsburgh & West Virginia Coal Company to the Diamond Fuel Company occurred on or about the 30th day of October, 1920, and the following circumstances and arrangements:

Moore & Company, wholesale coal dealers of Philadelphia, on the 29th day of October, 1920, ordered from the Pittsburgh & West Virginia Coal Company, which maintained its principal office in the American Building, Fairmont, West Virginia, fifteen (15) cars of coal and agreed to pay for the same at the rate of Nine (\$9.00) Dollars per net ton on board railroad cars at the mine. Moore & Company, by telephone conversation to the Pittsburgh & West Virginia

99

100. *Bill of Particulars of Petitioning Creditors.*

Coal Company stated that they were acting in the purchase of the coal for the Diamond Fuel Company. This conversation which was over the telephone took place between Moore & Company of Philadelphia, and Mr. Tutt, who was then Assistant Secretary of the Pittsburgh & West Virginia Coal Company and in the presence of Mr. T. F. Barrett, Vice-President and attorney of the said company, and who ratified the acceptance of the order by Pittsburgh & West Virginia Coal Company.

101 The order for the fifteen (15) cars of coal first came from Moore & Company in the form of a telegram signed by that company to the Pittsburgh & West Virginia Coal Company, a copy of which is as follows:

Philadelphia, Penna.
October 29, 1920.

Pittsburgh & West Virginia Coal Company,
Fairmont, West Virginia.

102 Wire or phone if you can get twenty cars pool thirty four must complete tomorrow.
Price nine dollars.

(signed) MOORE & COMPANY.

to which Pittsburgh & West Virginia Coal Company immediately replied as follows:

Fairmont, West Virginia,
October 29, 1920.

Moore & Company, Land Title Bldg.,
Philadelphia, Pa.

Your wire can't get you on the phone can furnish portion twenty cars pool thirty four

Bill of Particulars of Petitioning Creditors. 103

nine dollars probably all but won't accept firm order such short notice with one day limit on shipment account low car supply must have full shipping instructions not later than nine o'clock Saturday morning if we are to do anything.

(Signed) PITTSBURGH & WEST VIRGINIA
COAL CO.

and to which last telegram Moore & Company replied to the Pittsburgh & West Virginia Coal Company by telegram as follows: 104

Philadelphia, Penna.
October 30, 1920.

Pittsburgh & West Virginia Coal Company,
Fairmont, W. Va.

Your wire ship what you can up to fifteen cars tidewater coal exchange incorporated pool thirty four account diamond fuel company curtis bay coal piers baltimore permit J. D. C. three hundred fifty two C at nine dollars. 105

(Signed) MOORE & COMPANY.

and to which last telegram the Pittsburgh & West Virginia Coal Company replied as follows:

106 *Bill of Particulars of Petitioning Creditors.*

Fairmont, W. Va.
October 30, 1920.

Moore & Company, Land Title Bldg.,
Philadelphia, Penna.

Wire received working on same will wire
later results.

(Signed) PITTSBURGH & WEST VIRGINIA
COAL CO.

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At the time of the exchange of these telegrams there was a very active coal market in the coal regions of Northern West Virginia of which Fairmont, West Va., was the center. The telephone wires were overloaded with messages, and there were frequent delays of several hours in receiving telephone calls. The result of this was Pittsburgh & West Virginia Coal Company was not able that day, to wit: October 30, 1920, before the close of business to know that the coal had actually left the mines. But a day or two later received advice from the mines that the shipment had gone forward, and Pittsburgh & West Virginia Coal Company immediately notified Moore & Company.

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About a week or ten days, after the 30th day of October, 1920, the date when the shipment of this coal took place, Pittsburgh & West Virginia Coal Company received an invoice from J. E. Long Coal Company of Clarksburg, West Va., for eighteen (18) cars of coal consigned by that company to the Diamond Fuel Company in addition to and in excess of the original fifteen (15)

cars which had been ordered through Moore & Company. By that time the coal had passed the scales of the Baltimore & Ohio Railroad Company, at Keyser, West Virginia, and had actually reached its destination at Curtis Bay Coal Piers of the Baltimore & Ohio Railroad Company at Baltimore. A few days after these facts came to the knowledge of the Pittsburgh & West Virginia Coal Company, it applied to the Tidewater Coal Exchange at Baltimore to know if the coal had reached the pool, to which it had been consigned, and if it had been credited to the consignee, the Diamond Fuel Company. This was done by Mr. Barrett the vice-president and attorney for the Pittsburgh & West Virginia Coal Company. He presented the Tidewater Coal Exchange a list of railroad cars on which this coal was shipped, together with the car numbers and weights of the same, and he received the information from the Tidewater Coal Exchange that the said cars of coal had been received and credited to the Diamond Fuel Company. Mr. Barrett next took the matter up with the Diamond Fuel Company in New York at its office No. 25 West 43rd Street, on or about the 15th day of December, 1920. He met at the office of the Diamond Fuel Company by appointment Alexander R. Watson, who was then the vice-president of the Diamond Fuel Company and the officer in actual charge of its business. Mr. Watson stated to Mr. Barrett at that interview that he believed his company had received the coal, and that it had been credited to his company by Tidewater Coal Exchange, but that he had purchased several thousand cars of coal at that

112 *Bill of Particulars of Petitioning Creditors.*

- time, principally through various brokers, and that the coal might have been ordered by any one of these brokers, and that he would have to have time to check up the books of his company and learn if the coal had actually been received by the Diamond Fuel Company, and had been credited to its account and used by it, and he promised to do this within a week or ten days. About ten days after that time Mr. Barrett had another conversation with Mr. Watson at the same office, at which Mr. Watson stated that the accountant in the office of the Diamond Fuel Company had checked up the record and had ascertained that the coal had been received by them. He was then asked by Mr. Barrett to make settlement for it upon the basis of the price at which the fifteen (15) cars had been sold through Moore & Company. This Mr. Watson stated he thought that they were not obligated to do, but that they were willing to pay for it at the then prevailing price of coal, the price prevailing at this time being from \$4.00 to \$5.00 per ton. This the Pittsburgh & West Virginia Coal Company refused to accept, and placed the account in the hands of Manning Stires, attorney at law of New York City, for collection.

114 Mr. Stires on or about the 17th day of December, 1921, wrote the Diamond Fuel Company demanding payment for the coal. The Diamond Fuel Company made answer to Mr. Stires by letter stating they had received the coal but had not placed an order with Pittsburgh & West Virginia Coal Company for it, and therefore would not pay for it except at the price then prevailing which was much less than the price which prevailed at the time of shipment, that his

Bill of Particulars of Petitioning Creditors. 115

company had received the coal in question, that it had been credited to their account by the Tidewater Coal Exchange, that no cars had been confiscated by the Railroad Company en route, and that the Diamond Fuel Company were willing to pay for it at the price of coal prevailing at that time.

Petitioning Creditors expect to introduce in evidence the original car record sheet, kept in the office of the Pittsburgh & West Virginia Coal Company at Fairmont, Va., at the time this coal was shipped showing the date of shipment, the destination, name of the consignee, number of railroad cars, car weights, and other details. Also the original invoice from the J. R. Long Coal Company to the Pittsburgh & West Virginia Coal Company covering the same identical cars at the price of \$8.25 per net ton to the Pittsburgh & West Virginia Coal Company, a copy of the invoice of the Pittsburgh & West Virginia Coal Company to the Diamond Fuel Company covering the same identical cars of coal at the price of \$9.00 per ton, original ledger sheet kept by the Pittsburgh & West Virginia Coal Company, showing that this coal was charged to the account of the Diamond Fuel Company. The Pittsburgh & West Virginia Coal Company further expects to show that the time this coal was shipped, it was intended to be exported from the United States to Europe. That under the war regulations which were still in force at that time, it could not be shipped, and would not be moved from the mines by the railroad company, and could not pass the railroad scales, or be weighed unless the permit number issued by the govern-

118 *Bill of Particulars of Petitioning Creditors.*

ment authorizing this coal to be shipped was exhibited, and the Diamond Fuel Company had the authority to ship the coal for export purposes. That the permit in this particular case was No. JDC-352C, and that that was the government permit under which this coal was shipped.

119 Petitioning creditors expect to prove by W. H. Cochran of Pittsburgh, that he has charge of and in his possession the books of account and other records of Pittsburgh & West Virginia Coal Company. That the records of said coal company show the shipment of the coal in question which are to be introduced in evidence as hereinbefore stated and described, and which are records of the company taken from its office and are original.

120 The petitioning creditors expect to prove by Manning Stires, the matters hereinbefore stated in which Mr. Stires took part, and especially to show by Mr. Stire's testimony receipt of a letter from Baker & Baker of Washington, D. C., counsel for the Tidewater Coal Exchange dated December 13, 1920, by which letter it will be shown that the Tidewater Coal Exchange refused to give Mr. Stires certain information he desired respecting the coal in question. Also a letter from the Baltimore & Ohio Railroad Company under date of December 20, 1920, describing by initial and car numbers sixteen of the eighteen cars of coal as having been delivered by said railroad company to the Tidewater Coal Exchange at Curtis Bay Piers, Baltimore, Md., to the credit of the Diamond Fuel Company.

Dated, January 30, 1922.

T. F. BARRETT.

CASE.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

THE DIAMOND FUEL COMPANY,
An Alleged Bankrupt.

122

United States of America,
Northern District of West Virginia,
State of West Virginia,
County of Harrison ,to-wit:

The examination of witnesses de bene esse, beginning on the 29th day of December, 1921, on behalf of the petitioning creditors, and in support of the petition filed in this cause, before me, O. L. Haught, a Notary Public in and for Harrison County, West Virginia, at number 518-520 Goff Building, Clarksburg, Harrison County, West Virginia, in a certain suit now pending in the District Court of the United States for the Southern District of New York, in bankruptcy, upon the petition of James E. Law and Anthony F. McCue, and the Morgantown Coal Company, a corporation, and others, against

123

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Case.

The Diamond Fuel Company, a corporation, alleged bankrupt.

This day came J. E. Law and A. F. McCue, of the petitioning creditors, in person, and represented by J. E. Law, their counsel, and there being no witnesses called, upon motion of the said J. E. Law, the taking of these depositions is continued until tomorrow, December 30, 1921, then to be resumed at the same place and at the same hour designated in the notice.

125

Given under my hand this 29th day of December, 1921.

O. L. HAUGHT,
Notary Public.

126

Testimony of M. L. Taylor—Direct.

127

On this 30th day of December, 1921, at number 518-520 Goff Building, Clarksburg, Harrison County, West Virginia, the taking of these depositions is commenced.

APPEARANCES:

DELBERT M. TIBBETTS, of the firm of Kirlin Woolsey, Campbell, Hickox & Keating, appearing for Canute Steamship Company, Limited and Campagne Navigazione Sotay Aznar, creditors. 128

J. E. LAW, counsel for J. E. Law and A. F. McCue, partners, intervening petitioning creditors, and for the Morgantown Coal Company, a corporation, intervening petitioning creditor, Gordon B. Late, trading under the name of Gordon B. Late Coal Company, creditor, The Fisher Summit Coal Company, a corporation, creditor and H. J. Berry, creditor. 129

M. L. TAYLOR, a witness of lawful age being by me first duly sworn, deposes and says as follows:

Direct Examination by Mr. Law:

Q1. Mr. Taylor, state your name, age and place of residence. A. M. L. Taylor, age thirty-five, residence, Morgantown, West Virginia.

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Testimony of M. L. Taylor—Direct.

Q2. How far is that from the City of New York, approximately? A. It is about five hundred miles.

Q3. What connection have you, if any, with the Morgantown Coal Company? A. Vice-President and manager.

Q4. How long have you held the position of Vice-President and manager? A. Four years.

Q5. As such manager or as such vice-president have you knowledge of its books of account and money due it, and of its debts and liabilities? A. I do.

Q6. What do you know, if anything, of The Diamond Fuel Company, a corporation? A. You mean as to their account with us?

Q7. First, generally, where they were in business and what connection you had with them, if you ever traded with them. A. We did trade with them in 1920.

Q8. Where was their place of business, or where was it at that time? A. My understanding that their headquarters was in New York City, but we did our dealing at the Fairmont office.

Q9. Who has charge of the Fairmont office? A. Mr. Watson.

Q10. Mr. Alex. R. Watson? A. Yes, sir.

Q11. Was he also a member, stockholder and director of The Diamond Fuel Company? A. I am so informed.

Q12. What transactions, state in a general way, did you have with the Diamond Fuel Company in the summer or fall of 1920? A. We sold them coal and also bought some coal from them.

Q13. I will ask you to state whether or not you have made out an itemized account and statement of the accounts between your company, The Morgantown Coal Company, and The Diamond Fuel Company? A. We have, or the treasurer, Mr. Baumgartner.

Q14. Who is E. S. Baumgartner? A. He is treasurer of The Morgantown Coal Company.

Q15. I hand you what purports to be an itemized account showing the charges and credits between The Morgantown Coal Company and Diamond Fuel Company, and ask you what it is, and if it was made up under your supervision and direction? A. This statement is a statement of the coal which we sold The Diamond Fuel Company in October, 1920, and the amount purchased from them, which constitutes a credit, in October and November, 1920. 134

Q16. What is the balance due The Morgantown Coal Company from The Diamond Fuel Company, as per that statement of account?

Mr. Tibbetts: That question is objected to as not calling for competent evidence of the fact to be established, being limited to a statement from a document shown to the witness. 135

Mr. Law: I will withdraw the question for the time.

Q17. I will ask you to state whether or not if that account shows the condition of the debts and liabilities between The Morgantown Coal Company and The Diamond Fuel Company? A. It does.

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Testimony of M. L. Taylor—Cross.

Q18. What is the balance due, if any, from The Diamond Fuel Company to The Morgantown Coal Company? A. Sixteen hundred and thirty-one dollars and eleven cents, without interest, and with interest to be computed to December 31, 1921, would be a total of seventeen hundred and forty-seven dollars and twenty-five cents.

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Mr. Law: We now offer in evidence the memorandum from which the witness has refreshed his memory, and ask that it be filed as part of his deposition as Exhibit No. 1.

Mr. Tibbetts: The document offered is objected to as not the best evidence, and no proper foundation having been laid for secondary evidence.

Exhibit No. 1, being the itemized statement above referred to, is here marked and filed.

Cross Examination by Mr. Tibbetts:

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Q1. Mr. Taylor, are the transactions you have testified the only one your company has had with The Diamond Fuel Company? A. Without referring to my books of account I could not say definitely, but I believe they are.

Q2. Do you keep the books? A. Not personally.

Q3. Who does keep them? A. I have book-keepers, and the treasurer, Mr. Baumgartner, and Mr. Baumgartner, as treasurer, has direct charge of all the books.

Q4. How many persons do you have on your books? A. At what time?

Q5. How many did you have during the fall of 1920, approximately? A. Well, I suppose during the fall months we had as many as three or four.

Q6. I mean by that, how many did you have working on your books as bookkeepers? A. Three or four at different times.

Q7. And Mr. Baumgartner was in charge of these bookkeepers, was he? A. He was.

Q8. What were your particular duties for the company? A. Manager. 140

Q9. That is, you were general manager of all its operations, were you? A. I was.

Q10. Do you know whether or not The Diamond Fuel Company either paid money to your company or furnished coal which would amount to an aggregate credit of six thousand, nine hundred and seventy-three dollars and twenty-six cents during the year 1920? A. I do not know without referring to my books.

Q11. Did you ever make an examination of the books of The Diamond Fuel Company to ascertain the status of your accounts as show by their books? A. I never did. 141

Q12. If their books should show a credit in the amount I have stated, are you in a position to state whether or not that is correct? A. I am not, without reference to our books, because it may be possible there are other transactions during the year, which we have charged on our books, which are not included in this statement.

Q13. Did you make up the statement which you have produced here this morning yourself? A. Not personally, no.

Q14. Did you examine the books at the time it was being made to ascertain its correctness yourself? A. I did.

Q15. What are the names of the books from which this statement is taken? A. Taken from our ledger.

Q16. You examined the ledger account personally, did you, at the time this statement was made up? A. I did.

143 Q17. And so far as you know, does that show all of the transactions had between The Diamond Fuel Company and The Morgantown Coal Company? A. I would not say that. I would say it shows a balance due on this transaction. There may be another transaction during the year that this statement does not show.

Q18. Well, do you know whether there were any other transactions during the year or not? A. I don't know positively.

Q19. If any had been had would they have been with you? A. What do you mean by being with me?

144 Q20. If any transactions prior to this that you have testified to had been had between your company and Diamond Fuel Company, would such transactions have been had with you as manager of The Morgantown Coal Company? A. Under my supervision. I have assistants, but I assume the responsibility for the assistants.

Q21. Do you mean by that that you do not have personal knowledge of all the transactions of the company? A. No, I do not mean that. But I don't recall at this time whether there were other transactions during the year with The Diamond Fuel Company.

Q22. Do you recall whether there were ever any other transactions with The Diamond Fuel Company except those you have testified to this morning? A. I do not positively.

Q23. Upon what terms were these consignments of coal by your company to The Diamond Fuel Company, beginning October 15, 1920, made to The Diamond Fuel Company? A. Our terms to all customers, unless by special arrangement, is cash upon receipt of invoice from us. Without referring to the contract covering this particular transaction I am not in a position to say whether that extended to the 20th of the month following shipment or not, which is the usual terms in coal transactions.

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Q24. You say, if it was handled in the ordinary way, the account for coal shipped in October would have been due November 20, 1920? A. In the ordinary way, in our office, it would have been due upon presentation of our invoice.

Q25. What did you mean by the 20th of the following month? A. The usual terms, the 20th of the following month, between brokers and wholesalers in this district. But we have a special contract which specifies that our money is due upon presentation of our invoices, and the only change in that is where we make special arrangement with our customers.

147

Q26. If payable upon presentation of the invoices would that ordinarily be earlier than the usual custom you speak of? A. Ordinarily be earlier.

Q27. Do you know whether or not there was any special contract in the case of The Diamond Fuel Company? A. I cannot say without referring to the contract.

Q28. I believe you stated your transactions were with Mr. Watson? A. His office, yes.

Q29. Did you not say that the person who dealt with you was Mr. Watson? A. Yes, sir.

Q30. In what way did he make these arrangements for the purchase of coal, by letter or telegram or telephone? A. Usually by telephone, and confirmed by orders.

Q31. Have you your books here? A. I have not.

Q32. Do you know whether any letters passed between your office and Mr. Watson's concerning these particular transactions? A. I think there were, but without having them to refer to I could not make definite statements.

Q33. Do you know whether the letters were signed by Mr. Watson personally or not? A. I would not want to say that without seeing them.

Q34. That is to say, do you know whether or not any letters you may have received bore the signature of The Diamond Fuel Company or were they signed personally by Mr. Watson? A. I do not like to make a statement about letters without having them to refer to.

Q35. Have you any of those letters or documents of any character dealing with these transactions in this city? A. Not in this city, no.

Q36. When could you have them here? A. I could have them here tomorrow.

Q37. Why did you not bring your ledger along with you? A. Never was asked to, and did not think it was necessary.

Q38. Why didn't you think it was necessary? A. I thought that statement was sufficient.

Testimony of M. L. Taylor—Cross.

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Q39. Who asked you to bring the ledger? A. Nobody yet.

Q40. I understood you to say you were asked to and you did not, you did not think it was necessary? A. No, I said I did not think it was necessary.

Q41. Under the heading of "Credits" on this statement you have presented there is a notation, "December 17, 1920, B. & O. 27177 confiscated by B. & O. R. R. 48213." Do you know what that means? A Yes

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Q42. What does it mean? A. It means that the B & O. Railroad confiscated that car en route, and we gave The Diamond Fuel Company credit for it.

Q43. Was that coal you had purchased from The Diamond Fuel Company? A. That was coal we had sold The Diamond Fuel Company.

Q44. There is a credit of Three hundred and seventy-four dollars and forty Cents, according to this statement, on November 29. Do you know whether that date indicates the time the coal was received by you or the time that the order was placed? A. I do not, without referring to the books.

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Mr. Tibbetts: I move to strike out the document offered, marked as Exhibit No. 1 and the testimony of this witness in respect to it, on the ground that the document is not the best evidence, and that from the testimony of the witness it does not appear that he has certain information as to the exact nature of the transactions had on the persons with whom they were had.

154 *Testimony of M. L. Taylor—Re-direct.*

Re-direct Examination by Mr. Law:

Q1. These shipments of coal were shipped under whose order and direction, and to whom?

Mr. Tibbetts: I object to that unless the witness can testify of his own personal knowledge.

A. I am not in position, without referring to our records, to say definitely as to how the coal was consigned.

155 Q2. I am not asking you particularly as to how it was billed, but to whose account was it charged? Diamond Fuel Company's account.

Q3. Was it shipped under The Diamond Fuel Company's orders and directions? A. It was.

Q4. All these charges that you have here on this bill or on this statement? A. Yes, sir.

Q5. You were asked by counsel about the item "December 17, 1920, B. & O. 27177, confiscated by B. & O. R. R. Co. 48213." What do I understand you to say that was? A. A credit of coal, a car of coal we had charged to The Diamond Fuel
156 Company and consigned to their account, and was confiscated by the B. & O. Railroad Company, and we gave them credit for it and charged it to the B. & O.

Q6. Can you state what car it was? A. B. & O. 27177.

Q7. Under what date of shipment? A. Shipped October 15, 1920.

Q8. Then on December 17, you gave them credit for the car which had been confiscated, the same car? A. Yes, sir.

Testimony of M. L. Taylor—Recross.

157

Q9. I will ask you to state whether you rendered statements to The Diamond Fuel Company from time to time in accordance with this account. A. Yes, sir, I did.

Q10. Where were those statements mailed, to what post office? A. I think they were mailed to New York, but I would not be positive.

Q11. I will ask you to state whether you had any dealings with Mr. Watson in his individual capacity with respect to selling to him individually any coal, or buying individually from him. A. Not in reference to this account.

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Q12. Were you in communication with the New York office of The Diamond Fuel Company respecting these matters? A. I have been.

Recross Examination by Mr. Tibbetts:

Q1. Has your company dealt with Mr. Watson personally in any transaction? A. Not to my recollection.

Mr. Law: That question is objected to because it is not material whether they have or not.

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Q2. In answer to previous questions of myself, you stated, did you not, that you did not recall whether such letters as may have passed between your company and The Diamond Fuel Company or Mr. Watson, in connection with these transactions, were signed by Mr. Watson personally or in the name of The Diamond Fuel Company? A. I assumed that all letters between The Diamond Fuel Company and our company

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Testimony of M. L. Taylor—Recross.

were signed by someone as The Diamond Fuel Company, and not by Mr. Watson or anybody else individually.

Q3. But do you know that as a fact? A. I do not know that without referring to my records.

Q4. Did you ever deal with anyone else who purported to be connected with The Diamond Fuel Company except Mr. Watson? A. I think so.

Q5. Who else? A. Without referring to our records I would not be in a position to say. I know that I have had correspondence with Mr. Yerkes.

Q6. Do you know what the nature of that correspondence was? A. I have a pretty good idea. It was trying to collect the account.

Q7. What account, the one you have just testified to? A. Yes, sir.

Q8. Do you recall what Mr. Yerkes said? A. No.

Q9. Do you know the position of Mr. Yerkes with The Diamond Fuel Company? A. I do not.

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Recess taken until one-thirty o'clock
P. M.

Testimony of Gordon B. Late—Direct.

163

At one-thirty o'clock P. M. the further taking of this evidence is hereby resumed.

GORDON B. LATE, a witness of lawful age, called on behalf of the petitioning creditors, being by me first duly sworn, deposes and says as follows:

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Direct Examination by Mr. Law:

Q1. State your name and your age and place of residence. A. Gordon B. Late, age forty-one, residence Newburg, West Virginia.

Q2. How far is your place of business or place of residence from the City of New York? A. About five hundred miles.

Q3. In what business have you been engaged for the year 1920? A. Coal business.

Q4. Under what name? A. Gordon B. Late Coal Company.

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Q5. Is that a corporation or partnership or is it your individual business? A. It is my individual business.

Q6. I will ask you to state whether or not you were connected in a business way with The Diamond Fuel Company? A. I was.

Q7. Where is their place of business? A. In New York City.

Q8. In what business were they engaged? A. Engaged in the coal business.

Q9. Was it a corporation or partnership, if you know? A. It is my understanding it is a corporation.

Q10. What members of the firm did you know, or corporation? A. Well, I knew the president, Mr. H. P. Bope, and Mr. Yerkes, who I understand was the secretary, and Mr. Watson, the general manager.

Q11. You have been in their place of business? A. Yes, sir.

167 Q12. Frequently? A. Yes, I have been in their office several times.

Q13. I will ask you to state whether, during the year 1920, you had any business transactions with them. A. Yes, sir, I sold them quite a lot of coal.

Q14. To whom was this coal sold? A. Sold to The Diamond Fuel Company.

Q15. About when did these transactions commence? A. Why, I think it was in August, sometime in August the shipments started.

Q16. In 1920? A. In 1920, yes, sir.

168 Q17. Had you had any dealings with The Diamond Fuel Company prior to that time, any other transactions? A. No, sir, no other transactions that I recall.

Q18. You have here what purports to be a carbon original duplicate of a statement made by Gordon B. Late Coal Company to The Diamond Fuel Company of New York City. I will ask you to state what that is and what it shows.

Mr. Tibbetts: I object to the witness stating what it shows. The instrument may speak for itself. I think he may answer what the nature of the document is.

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A. It is a statement of the amount of coal shipped to The Diamond Fuel Company from August 31, 1920—a statement of the invoices rendered the Diamond Fuel Company, I should have said, for coal shipped, and the amount of credits allowed to The Diamond Fuel Company.

Q19. Between what dates were these transactions? A. Between August 31 and November 30, 1920.

Q20. Who was the coal named there shipped by; who sold the coal to The Diamond Fuel Company? A. Gordon B. Late Coal Company.

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Q21. And that Gordon B. Late Coal Company is yourself individually? A. Yes, sir.

Q22. I will ask you to state whether that statement is a correct statement of the invoices, the charges and credit items expressing the account between yourself and The Diamond Fuel Company. (A. It is.

Q23. What is the amount of the debit charges according to that statement? A. Two hundred and forty-six thousand, six hundred and forty-five dollars and four cents.

Q24. What are your credits? What is the complete total of the credits? A. Fifty-five thousand, three hundred and six dollars and twenty-six cents.

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Q25. That would leave a balance due whom? A. A balance due the Gordon B. Late Coal Company of One Hundred and Ninety-one Thousand, Three Hundred and Thirty-eight Dollars and Seventy-eight Cents.

Q26. I will ask you to state then, Mr. Late, what is the balance due you or due the Gordon

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B. Late Coal Company from The Diamond Fuel Company? A. One hundred and ninety-one thousand, three hundred and thirty-eight dollars and seventy-eight cents.

Q27. Does that include any interest? A. It does not.

Q28. As of what date is that amount due? A. That amount would be due on November 30, the day the last invoice was rendered.

Q29. November 30, 1920? A. Yes.

173 Q30. It would not all have been due at that time? A. It would all have been due except the last invoice.

Q31. Some of it would have been due before that time? A. Oh, yes, all except what was shipped in November.

Q32. But your item here of One hundred and ninety-one thousand, three hundred and thirty-eight dollars and seventy-eight cents is, as I understand you, the balance of principal due, and does not include any interest? A. That is correct.

174 Q33. And upon that amount interest should be calculated from approximately what date? A. Interest should be calculated on each amount for the account after the account is due, each month, for the month that shipment was made prior to that. In other words, you take the first month's shipment of August and the interest would start in the latter part of September.

Mr. Law: We now offer in evidence the statement of the account handed the witness, and from which he has testified, and ask that it be filed as part of his deposition and marked as Exhibit No. 2.

Testimony of Gordon B. Late—Direct.

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Mr. Tibbetts: It is objected to on the ground that it is not the best evidence, and not a proper foundation laid for the introduction of secondary evidence; and upon the further ground that it is immaterial to any issue in this case.

Exhibit No. 2, being the statement above referred to, is here marked and filed.

Q34. Mr. Late, from what is the copy that I have referred to, and filed here in evidence, made? A. Made from my ledger or books.

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Q35. It is a correct statement of the information and entries contained upon your ledger? A. It is, yes, sir.

Q36. I will ask you to state whether or not you have from time to time rendered statements to The Diamond Fuel Company for the items contained in this statement. A. Nothing more than the bills we have mailed for the coal. There has been no statement rendered since the last bill was filed.

Q37. But you rendered, at the time of the transaction, bills? A. Yes, sir, bills were filed.

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Q38. You have the original bills? A. Yes, sir. I haven't the original bills; they were mailed to The Diamond Fuel Company. I have my records of them.

Q39. And they were consulted in the making out of this? A. They were, yes, sir.

Q40. Is that account correct? A. It is.

Q41. I will ask you to state, Mr. Late, what properties or assets, if you know, The Diamond Fuel Company owned in West Virginia at or

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about the 25th day of February, 1921, that is about or at the time when the original petition in bankruptcy was filed against The Diamond Fuel Company.

Mr. Tibbetts: That question is objected to unless some proper basis is laid showing the source and extent of the knowledge of the witness.

179 A. Well, they owned what is known as the Boat Run Mine.

Q42. Where is that situated? A. That is on the Belington—Crafton and Belington branch of the B. & O.

Q43. Near what town or place? A. Arden, West Virginia.

Q44. In what county? A. I think it is Barbour County.

180 Q45. What does that consist of, that plant, how many acres of coal or what equipment? A. My information is that it consists of a tract of about seven hundred acres. I would not say that is the exact acreage, but my understanding was about seven hundred acres of coal in the property, with something like six hundred acres of virgin coal.

Q46. What vein of coal is it, what formation? A. What we call the Freeport.

Q47. What sort of mining plant or equipment? A. They have an electrical mining plant.

Q48. Was that held by The Diamond Fuel Company in fee, the coal? A. That is my understanding, it is in fee.

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Q49. You have been at the plant many times, I suppose? A. Yes, sir, I have been at the plant. Not a great many times, but I have been there.

Q50. You know its location and extent of holdings? A. Just in a general way, yes, sir.

Q51. From whom did they buy that plant, if you know? A. Why, my information was that they bought it at a sale of The Initial Fuel Company.

Q52. A bankrupt sale? A. That is my understanding.

Q53. Do you recall about when? A. Well, I could not fix the exact date. I think it was about 1918 or 1919.

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Q54. Do you know what they paid for it at that sale?

Mr. Tibbetts: I object to that as immaterial.

A. No, sir, I could not say what they paid for it.

Q55. Have you been dealing in coal properties for the last few years, and have you a general knowledge of the value of coal properties? A. I have been dealing in some coal properties in the last few years.

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Q56. Have you a general knowledge of coal and coal properties, and plants and equipment? A. Well, I think I have.

Mr. Tibbetts: Do you know the value of coal properties in that neighborhood? A. I would know what I would think it was worth.

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Mr. Tibbetts: Do you know the general run of value, or what might be termed marked price of properties there?

A. I don't just understand what you mean.

Mr. Tibbetts: You know what the market price means, don't you, what a thing would sell for on the market if the owner desired to sell and he had a purchaser who desired to buy such property?

185 A. Well, different owners would pay different prices on the property, especially during the last few years.

Mr. Tibbetts: Is there anything of a uniform character as to mining properties in that neighborhood?

A. The conditions would govern the price a good deal in the coal business.

Q57. What in your opinion would that plant sell for, Mr. Late, what were referred to as the Boat Run Mine of the Diamond Fuel Company,
186 if it were offered for sale to a person who really wanted to purchase the property, and upon reasonable terms of payment?

Mr. Tibbetts: Question objected to as immaterial and not fixing the time of sale; and further objected to on the ground that the witness has not shown himself competent to answer the question.

A. I would consider fifty thousand dollars a good price for it.

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Q58. Now what other properties did the Diamond Fuel Company have in West Virginia that you know about? A. They owned a property adjoining that which I understood was a leased property, called the Lee Mine.

Q59. That is it was being operated on a royalty? A. Yes, sir.

Q60. They owned nothing in fee then in it? A. No, sir, I think not.

Q61. What do I understand you to mean when you say a leased property? A. Well, they paid so much a ton royalty for the coal actually mined or produced. 188

Q62. What has become of that, if you know? A. I think the lease has been forfeited for failure to pay.

Q63. For failure to pay the royalty? A. Yes, sir.

Q64. Or operate the plant? A. Yes, sir.

Q65. Has it any material or substantial value, or did it have in February last?

Mr. Tibbetts: I want to make the same objection as made to the previous question. 189

A. I don't think it had any value. It would not have for me.

Q66. What other properties did they own in West Virginia? A. They also had a property at Volga, West Virginia.

Q67. What kind of property was that? A. That was a leased property. It was near Volga. I don't think it was right at the station.

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Q68. You say that was a leased property? A. You might call it a leased property. It was operated with an option to buy.

Q69. What has become of that property if you know? A. Well, I don't know what became of it.

Q70. Do you know whether The Diamond Fuel Company is still operating it? A. No, I don't think so. I think that was cancelled; that is my understanding, that the option or lease was cancelled on that property.

191 Q71. And The Diamond Fuel Company has no longer any interest in it? A. Not to my knowledge, no, sir.

Mr. Tibbets: I object to the last question as leading, and move to strike out the last two answers of the witness as being based upon hearsay knowledge, and not of his own knowledge.

Q72. And what other property, if you know, did The Diamond Fuel Company own in this region, or in West Virginia? A. They own what they call the Stone Mine on the Buckhannon division or Pickens division of the B. & O., that runs from Weston to Buckhannon.

192 Q73. Is that known as the Stone Coal Mine? A. The Stone Mine, we always called it.

Q74. About how far is that from Weston? A. About a mile.

Q75. In what county is that? A. In Lewis County I think.

Q76. Do you know from whom they purchased that? A. The Stone Coal Company.

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Q77. What has become of that plant? Does The Diamond Fuel Company still own it? A. No, sir, it has been sold.

Q78. For what? A. For a vendor's lien on the purchase money or balance of the purchase money that was due on it.

Mr. Tibbetts: When was it sold?

Mr. Law: It was sold September 29, 1921.

A. I could not just give you the date, but it was along in the fall, in September.

194

Q79. Do you know what it brought, at that sale? A. No, sir, I do not.

Q80. Do you know whether it brought enough to pay the vendor's lien? A. Only from hearsay what I was told.

Mr. Tibbetts: I object to the answer as based on hearsay.

Q81. Did you at any time have occasion to investigate what the lien was and the amount of the lien that was on that Stone Coal property? A. Yes, sir.

195

Q82. How much was that? A. Fifty thousand dollars.

Q83. Did you at any time have occasion to investigate the amount of the lien or outstanding liability of record on the Boat Run Mine? A. Yes, sir.

Q84. What was that outstanding lien? A. Fifty-five thousand dollars.

Q85. In what form was that? A. Bonds.

Q86. Was the Stone Coal Mine included in that security for that bond issue? In other words did that bond issue include all the properties of the Diamond Fuel Company in West Virginia?

A. Yes, sir, that is my understanding, from reading the papers, that it included all the properties they owned or might acquire.

Mr. Tibbetts: You said "papers".

A. I should have said the mortgage.

197 Q87. What did you mean when you said by the "papers"? A. I meant the mortgage under which this bond issue was made.

Q88. And title papers generally? A. Yes, sir. They was in the hands of Mr. Robinson, the attorney, is where we got the information.

Cross Examination by Mr. Tibbetts:

Q1. Upon what terms did you sell coal to the Diamond Fuel Company? A. Well, on the usual terms.

198 Q2. What are the usual terms? A. All invoices are payable the 15th of the following month.

Q3. That is to say coal sold in September would be due the 15th of October? A. Yes, sir.

Q4. And that sold in October would be due the 15th of November? A. Yes, sir.

Q5. And that sold in November would be due in December? A. Yes, sir, etc.

Q6. In the statement which you have submitted there are various items of charges against the Diamond Fuel Company under date of Oc-

tober 30th. Do those items indicate that you received the weights of the coal and made out bills to The Diamond Fuel Company during the month of October? A. Yes, sir, I would say they did.

Q7. And correspondingly the amounts that are indicated under date of November 30th would indicate the weights during November and bills made out during the month of November, were they? A. Well, I do not mean to convey here the idea that all this coal that was billed in November, that it was weighed in November.

Q8. Well, was all the coal that you have noted under date of November 30th then billed during the month of November? A. It was, yes, sir.

200

Q9. And all coal under date of October 30th on your statement there was billed during October, wasn't it? A. Yes, sir.

Q10. Now then, I will ask you to state the total amount, in dollars, of the coal billed to The Diamond Fuel Company during the month of October, and during the month of November. I understand you to say off the record, Mr. Late, that if coal went forward one of the last days of September, for instance, that you did not get the weights so that you could make up a bill until one of the first days of October, but you then probably would have billed the coal as of the last day of September, when it actually went forward; is that correct? A. That is correct.

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Q11. Therefore, in the statement which you have submitted, it is my understanding that the amount shown under date of October would in-

clude all bills made up and rendered in October except such few as may have been billed in the early days of the month for coal which went out the latter part of September, is that correct? A. I would not say that it was.

Q12. Does the amount which the statement you have submitted shows for October 30th and November 30th, include all the coal which was billed to The Diamond Fuel Company in October and November, 1920? A. It does.

Q13. I will ask you then to please state what amount was so billed to The Diamond Fuel Company for each of these months separately, and you may also include any other month in your statement. A. August is Five thousand, four hundred and fifty-five dollars and sixty-five cents; September is Eighty-six thousand, five hundred and sixty-five dollars and eighty-six cents; October is One hundred and forty-one thousand, six hundred and twenty-one dollars and two cents; November is Thirteen thousand and two dollars and fifty-one cents, making a total of Two hundred and forty-six thousand, six hundred and forty-five dollars and four cents.

Q14. You state that what was known as the Boat Run Mine was purchased by The Diamond Fuel Company at the bankrupt sale, but you stated you did not know exactly what the price was paid for it at that sale. Do you know approximately what the amount was? A. Only what I heard. I can give you that.

Q15. You may. A. Thirty thousand dollars was my understanding.

Q16. Do you mean by that that your understanding was they paid Thirty thousand dollars

besides assuming the encumbrances upon it? A. That is my understanding of the amount of money they paid or put into it. I don't know what indebtedness they assumed.

Q17. Do you know whether or not The Diamond Fuel Company purchased any property during 1918 or 1919 in which it paid approximately one hundred and fifty thousand dollars? A. No, sir, I do not.

Q18. Do you know what was paid for the other properties which The Diamond Fuel Company had in West Virginia? A. Not first handed, no, sir. 206

Q19. What is your best information as to the cost of the other properties which you have testified about? A. Well, the Stone property, I understood, when we were in New York, that they had paid something like Eighty-five thousand dollars for it. That was talked in the office there among the creditors when I was down there.

Q20. When was that purchased? A. I could not tell you what date it was purchased.

Q21. Do you know about what year? A. No, sir, I do not. 207

Q22. Was it not about August 24, 1920? A. I would not say. I don't know when they purchased it.

Q23. Was it your recollection it was sometime during the year 1920? A. Yes, sir, it is my understanding it was sometime during the year 1920.

Mr. Law: It is stipulated on the record that the Stone Coal property was pur-

chased by The Diamond Fuel Company of New York from the Stone Coal Company for the sum of Eighty thousand dollars, Twenty-five thousand dollars of which was paid cash, and for the residue notes were executed and a vendor's lien retained. The deed was prepared the last of August, 1920, but not delivered until sometime in September.

Q24. Do you know what the property in Volga cost The Diamond Fuel Company, and about when it was purchased? A. No, sir, I do not.

Q25. Do you know what the Lee Mine cost, and about when it was purchased? A. No, sir, I could not tell you that.

Q26. There was a corporation known as The Diamond Operating Company also, wasn't there? A. Yes, sir.

Q27. Do you know whether that is owned by The Diamond Fuel Company or not? A. Yes, sir, I think it was.

Q28. In the list of credits which you have given on your account is anything included on account of the transfer of properties to a man by the name of Chestnut for the benefit of yourself and others? A. No, sir.

Q29. Why not, are you not treating that as a valid transfer, or as any credit upon your indebtedness? A. No, I did not treat it as any credit at all.

Q30. Has the property been reconveyed to The Diamond Fuel Company? A. Not that I know of.

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Q31. Do you consider that you did not get anything of value out of that transaction whatever?

A. No, sir, I did not.

Q32. What is the nature of the credit item you have shown there, is it cash or cash and coal combined? A. Part of it is for cash and part of it is for coal that was confiscated.

Q33. Coal which you had sold The Diamond Fuel Company and it was confiscated, which they did not receive? A. Was not delivered to them.

Q34. Are the only cash payments you have received those indicated for September, 1920? A. Well, there was one in October. 212

Q35. What date in October? A. October 22nd.

Q36. How much is that? A. Check number 207 for Twenty thousand dollars.

Re-direct Examination by Mr. Law:

Q1. Then all the credit you have mentioned in this account to The Diamond Fuel Company for September is credited on account of checks? A. Yes, sir.

Q2. All the rest of the credits, except the one of October 22nd, check number 2017 for Twenty thousand dollars, is for coal which was confiscated or not delivered to The Diamond Fuel Company, but which they had prior to that time been charged with. A. All except three items, an item of fifty-five dollars and fifty cents, twenty-eight dollars and fifty cents, and forty-five dollars. 213

Mr. Tibbetts: What is the nature of these three items of credit?

214 *Testimony of Gordon B. Late—Re-direct.*

A. Those three items would be the difference in weight, or error in invoices.

Mr. Tibbetts: Not payments in money?

A. No, it is just a credit.

Mr. Law:

215 Q3. Mr. Late, some reference has been made here to the title of this mine situate near Arden, in Barbour County, West Virginia, known as the Boat Run Mine, as as well as to the title of the property situate near Weston known as the Stone Coal property, and the rights or title to whatever interest The Diamond Fuel Company formerly held in a plant at Volga, and also to the right or title, whatever it consisted of, in the additional property it held at Arden, adjoining the Boat Run Mine, which I believe you said was a leasehold estate. What do you know, if anything, as to where the legal title to that property is? Was it ever conveyed to any one that you know of? A. It was conveyed from The Diamond Fuel Company to Charles Chestnut of Philadelphia, and from Charles Chestnut to the Barbour-Lewis Coal Company.

216 Q4. Mr. Late, I hand you a deed bearing date November 27, 1920, executed by The Diamond Fuel Company to Charles S. Chestnut of the City of Philadelphia, and ask you to state what it is. A. This deed conveys the property of what we call the Stone Mine in Lewis County from The Diamond Fuel Company to Charles S. Chestnut.

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Q5. I will ask you to state whether that is the original deed. A. Yes, sir, this is the original deed.

Mr. Law: We now offer in evidence the deed referred to and as that it may be marked and filed as part of the depositions in this case as Exhibit No. 3.

Exhibit No. 3, being the deed above referred to, is here marked and filed.

Q6. Now I hand you a deed bearing date the 7th day of January, 1921, executed by Charles S. Chestnut and his wife, Maud, to the Barbour-Lewis Coal Company, a corporation, and ask you what that deed is. 218

Mr. Tibbetts: I object to that as immaterial.

A. This is a deed from Charles S. Chestnut and wife to Barbour-Lewis Coal Company conveying the Stone Coal Company property.

Q7. To whom? A. To the Barbour-Lewis Coal Company. 219

Mr. Law: We now offer this last deed in evidence, as a part of the depositions in this case, and ask that it be marked as Exhibit No. 4.

Exhibit No. 4, being the deed above referred to, is here marked and filed.

Q8. Is the property conveyed by The Diamond Fuel Company to Chestnut represented in

220 *Testimony of Gordon B. Late—Re-direct.*

Exhibit No. 3, and the property represented in the deed, Exhibit No. 4, conveyed from Charles S. Chestnut and wife to the Barbour-Lewis Coal Company, the same property? A. Yes, sir.

Q9. I now hand you a deed bearing date November 27, 1920, executed by The Diamond Fuel Company, a corporation, to Charles S. Chestnut and ask you to state what that deed is. A. This is a deed of The Diamond Fuel Company conveying to Charles S. Chestnut the property known as the Boat Run property at Arden in Barbour County.

Q10. Is that the original deed? A. It is, yes, sir.

Mr. Law: We now offer that deed in evidence to be marked as Exhibit No. 5.

Exhibit No. 5, being the deed above referred to, is here marked and filed.

Q11. I now hand you deed bearing date the 7th day of January, 1921, executed by Charles S. Chestnut and wife, of Philadelphia to the Barbour-Lewis Coal Company, and ask you what deed that is and what it conveys. A. This is a deed from Charles S. Chestnut to the Barbour-Lewis Coal Company conveying the Boat Run property at Arden in Barbour County.

Q12. Is that the same property that was conveyed by the last deed, marked Exhibit No. 5? A. Yes, sir.

Q13. From The Diamond Fuel Company to Chestnut? A. Yes, sir.

Q14. Is that the original deed? A. Yes, sir.

Mr. Law: We now offer in evidence the deed referred to as a part of the depositions in this case, and ask that it be marked as Exhibit No. 6.

Exhibit No. 6, being the deed above referred to, is here marked and filed.

Q15. I now hand you an agreement bearing date the 27th day of November, 1920, executed by Diamond Fuel Company, a corporation, to Charles S. Chestnut of the City of Philadelphia, and ask you to state what that is. A. This is an agreement between The Diamond Fuel Company and Charles S. Chestnut, whereby The Diamond Fuel Company transfers whatever title they might have in the Volga property.

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Q16. Is that the original agreement? A. Yes, sir, it is the original agreement.

Mr. Law: We now offer in evidence the agreement referred to, as part of the depositions in this case, and ask that it may be marked as Exhibit No. 7.

Exhibit No. 7, being the agreement above referred to, is here marked and filed.

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Q17. I now hand you what purports to be a deed bearing date the 7th day of January, 1921, executed by Charles S. Chestnut of the City of Philadelphia, and his wife, Maud M. Chestnut, to the Barbour-Lewis Coal Company, a corporation, and ask you to state what that is. A. This is a deed conveying the Volga Coal

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Company property by Charles S. Chestnut to the Barbour-Lewis Coal Company.

Q18. Is that the same property as is set out and described in Exhibit No. 7 last referred to by you? A. Yes, sir, the same property.

Q19. Is this the original deed? A. Yes, that is the original deed from Chestnut to the Barbour-Lewis Coal Company.

227 Mr. Law: We now offer in evidence the last deed referred to and ask that it be marked as Exhibit No. 8.

Exhibit No. 8, being the deed above referred to, is here marked and filed.

Q20. I now hand you what purports to be a deed made and executed on the 7th day of November, 1920 by The Diamond Fuel Company, a corporation, to Charles S. Chestnut, and ask you to state what it is. A. This is a deed conveying a certain contract and deed of lease on the Lee Collieries Company from Diamond Fuel Company to Charles S. Chestnut.

228 Q21. Is what you have there the original deed or contract? A. Yes, sir.

Mr. Law: We now offer in evidence the deed referred to as part of the depositions herein, and ask that the same be marked as Exhibit No. 9.

Exhibit No. 9, being the deed above referred to, is here marked and filed.

Q22. I now hand you what purports to be a deed bearing date the 7th day of January, 1921,

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executed by Charles S. Chestnut and wife to the Barbour-Lewis Coal Company, and ask you to state what that is. A. This is a deed from Charles S. Chestnut conveying to the Barbour-Lewis Coal Company all the estate, right and title in the Lee Collieries Company.

Q23. Is that the same property that was conveyed by the last deed you referred to as Exhibit No. 9? A. Yes, sir.

Q24. Is that the original conveyance? A. Yes, sir.

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Mr. Law: We now offer in evidence the deed last referred to as part of the depositions in this case, and ask that same be marked as Exhibit No. 10.

Exhibit No. 10, being the deed above referred to, is here marked and filed.

Q25. Mr. Late, who is and who composes the Barbour-Lewis Coal Company? A. Composed of the Seaboard Coal & Coke Company, Fisher-Summit Coal Company and H. J. Berry and Howard W. Showalter and myself, Gordon B. Late.

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Q26. I understand you to say this Barbour-Lewis Coal Company is composed of certain individuals, and also of the Seaboard Coal & Coke Company. Do I understand you that the Seaboard Coal & Coke Company has stock in the Barbour-Lewis Coal Company? A. No, I think the stock is issued to G. S. Hampton.

Q27. Where does he live? A. Philadelphia.

Q28. I also understood you to say that the Barbour-Lewis Coal Company was composed as

232 *Testimony of Gordon B. Late—Re-direct.*

well of the Fisher-Summit Coal Company. Has the Fisher-Summit Coal Company as a corporation any stock in the Barbour-Lewis Coal Company? A. The stock is issued to J. M. Stark.

Q29. Does the Barbour-Lewis Coal Company have exercise and control over any of these mines or plants? A. No, sir.

Q30. Has it ever exercised any control over any of these mines and plants? A. Yes, sir. They shipped a few cars of coal.

233 Q31. From what plant? A. From the Boat Run property, or from the Stone property.

Q32. Is the Barbour-Lewis Coal Company now claiming any interest, right or title under any of these deeds? A. No, sir.

Q33. What is the organization of the Barbour-Lewis Coal Company, and who is its president and directors and the like? A. I am the president of the company.

Q34. You are the president? A. Yes, sir.

Q35. Who are the other officers? A. J. M. Stark is treasurer.

234 Q36. Can you name any of the other officers? A. Yes. G. S. Hampton is vice president, and Joseph VanZandt is secretary.

Q37. I will ask you to state now, Mr. Late, whether the Barbour-Lewis Coal Company is willing and ready to make and execute a deed to The Diamond Fuel Company or its trustee in bankruptcy, or to any one the court may direct, conveying to The Diamond Fuel Company or its trustee or to such other person as the court may direct, the title of these several properties represented by these deeds? A. Yes, sir, I would say they are.

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Q38. Now Mr. Late, I want you to state what in fact was the consideration or supposed consideration that passed to The Diamond Fuel Company, or to any one else for these properties? State just how the transaction was carried out, if you were present at the time, and I believe you were. A. I was not present at the time, but was represented by counsel, Mr. D. S. Robinson of Philadelphia.

Q39. I want you to state what consideration passed from you or any of the rest of your associates for these properties, and how you were advised that this transaction was made. A. I know what the arrangements were, is all I know. 236

Q40. What were the arrangements, and between whom were the arrangements made; what were the arrangements made and between whom? A. They were made between D. Stuart Robinson and Gardner Yerkes.

Q41. What were the arrangements?

Mr. Tibbetts: I object to that as not being within the knowledge of this witness. 237

Q42. Where were these arrangements made?

A. In The Diamond Fuel Company's office in New York City.

Q43. Who were present when these arrangements were made? A. D. Stuart Robinson and J. M. Stark and G. S. Hampton and H. P. Bope and Gardner Yerkes and W. I. Booth and myself and S. J. Livingston and Howard Showalter and H. J. Berry and F. E. Stripe.

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Testimony of Gordon B. Late—Re-direct.

Q44. Now state what were the arrangements.

A. The arrangement was that—

Mr. Tibbetts: I object to that for the reason that the alleged agreement inquired about was merged in writing in the form of deeds, which have been offered in evidence, and that oral negotiations thereafter are not competent, and the written instruments must speak for themselves.

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Mr. Law: Counsel, in reply to the objection made to this question, insist that the deeds were only the manner and means by which the arrangements were carried out; and further, that it is also competent to show always by oral testimony, or otherwise, the real consideration which forms the basis of a deed.

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A. The arrangements were we were to produce a purchaser for the property at the price of Two hundred thousand dollars, and this money was to be paid over to The Diamond Fuel Company for the property and immediately pay to us on our account, and we were then to take the property over from the purchaser and pay the money over to him.

Q45. Who was this purchaser to be, and did you furnish such purchaser? A. Yes, sir.

Q46. In the person of whom? A. Charles S. Chestnut.

Q47. Then Charles S. Chestnut or the person you should furnish, was to pay The Diamond Fuel Company Two hundred thousand dollars

Testimony of Gordon B. Late—Re-cross. 241

for these properties, and that same Two Hundred Thousand Dollars was to be handed to the creditors of The Diamond Fuel Company at the same place? A. Yes, sir.

Q48. And charged to your account? A. Yes, sir.

Q49. And that same Two Hundred Thousand Dollars was to be handed to the purchaser produced by you, and for which he in turn was to make a conveyance of the property to you, or to a corporation organized by you? A. That is correct, yes, sir. 242

Q50. And was this Barbour-Lewis Coal Company organized for the purpose of taking over this property in that manner and on those terms? A. Yes, sir.

Q51. Was this man, Charles S. Chestnut, present at the time this arrangement was made?

A. No, sir.

Q52. So far as you know did he have any knowledge of the part he was taking in these affairs, that is as to whose purpose it was to serve, or anything of that sort? A. No, sir, I don't know that he did. 243

Q53. Do you know Charles S. Chestnut? A. No, sir, I have met him.

Re-cross Examination by Mr. Tibbetts:

Q1. Did you ever receive any part of the Two Hundred Thousand Dollars that was to be paid for this property? A. I did not, no, sir.

Q2. Did any of your associates ever receive any? A. Not to my knowledge, no, sir.

244 *Testimony of Gordon B. Late—Re-cross.*

Q3. You have heretofore testified as to your judgment of the value of those properties as of February, 1921. Would you say the value was different at the time the transaction in November took place, which you have testified about, either more or less? A. It would be worth less money in 1921.

Q4. In a period of three or four months that would be worth less? A. Yes, sir.

245 Q5. How much less? A. Well, they would depreciate, to be very conservative, at least 25 per cent.

Q6. You think they were worth 25 per cent. more in November, 1920 than they were in February, 1921? A. Yes, sir, and still be worth less today.

Q7. At the time of these negotiations that we have referred to The Diamond Fuel Company owed you a very large sum of money, didn't it? A. Yes, sir.

246 Q8. Is it not true that the greater part of that debt was on account of coal which had been furnished very recently prior to that date? A. Yes, sir.

Q9. Approximately what portion of the indebtedness would you say was furnished within a period of thirty days prior to last November? A. Well, I could not say until I would look it up, and give you the exact amount.

Q10. You have not the means to do that now at hand? A. Yes, sir.

Q11. Through what medium? A. Through the statements that have been filed here

Q12. But I understood you to say that the statement would show, under October 30, the

Testimony of Gordon B. Late—Re-cross.

247

amount given by all bills during October that is to say there might be bills going out every day from the first of October up to the 30th and so that you could not give the exact account for the thirty day period from this memorandum, could you? A. No, sir I could not give you the exact amount, but I could give it to you approximately.

Q13. You could give approximately what amount of coal was billed within thirty days prior to November 27? A. Yes, sir.

Q14. I will ask you to do that in connection with your answer to a previous question calling for the amount of bills sent out in October and November respectively. Were these other men that you have mentioned as being interested in the Barbour-Lewis Coal Company also creditors of The Diamond Fuel Company? A. Yes, sir. 248

Q15. Had they made recent shipments of coal to The Diamond Fuel Company at that time? A. Well, I could not say about that.

Q16. Was it the contemplation of the arrangements that you have testified about in New York that you and your associates, if the proposition should be carried through, should share in proportion to the amount of your respective claims? A. Yes, sir. 249

Q17. Who had the largest claim of these parties? A. Why, I did.

Q18. Do you know which was next to the largest? A. I think the Fisher-Summit Coal Company.

250 *Testimony of Gordon B. Late—Re-direct.**Re-direct Examination by Mr. Law:*

251 . Q1. Mr. Late, you said this agreement and understanding you spoke about was had at the office of The Diamond Fuel Company in New York, and stated who was present there. I wish you would state how long that agreement was had with respect to the execution of these deeds—state about when agreement was had, with respect to the execution of these deeds. A. Why this was in the latter part of November that this arrangement was made.

Q2. Was it completed prior to the execution of any of these deeds? A. Yes, sir, prior to the execution of the deeds.

Q3. And I will ask you to state whether or not these deeds were made in accordance with the arrangements had at that time? A. Yes, sir.

252 Mr. Tibbetts: I object to that question on the ground that it calls for the conclusion of the witness, and from the answer must be upon hearsay evidence.

Q4. Now your whole claims, Mr. Late, for coal shipped, as represented by your statement filed, were for shipments made in August, September and November, 1920, were they not? A. Yes, sir.

Q5. I will ask you, Mr. Late, to state what in your opinion was the value of these particular properties at the time this agreement was had or arrangements made in New York with The Diamond Fuel Company in November, 1920, and at the time of the execution of these several deeds.

Testimony of Gordon B. Late—Re-direct. 253

Mr. Tibbetts: I object to that as repetition.

A. You mean all the properties.

Q6. Yes, sir, all the property. A. Well, sir, I would not like to do that. I would not like to list them all separately.

Q7. List them the best you can.

Mr. Tibbetts: I object to the question on the ground that the evidence from the witness' answer and attitude is that he does not feel able to state such values separately. 254

Q8. What in your opinion would the Boat Run Mine, situate at Arden in Barbour County, bring if it was offered for sale, or if it had been offered for sale about the time you had the agreement in New York, and about the time of the execution of these deeds, to a person who wanted to buy it; what, in your opinion, would it have brought, and if such offer had been upon reasonable terms of payment? 255

Mr. Tibbetts: Question objected to. The same objection and for the further reason that the question should call for a cash transaction.

A. Well, my opinion is it would not have brought over fifty thousand dollars.

Q9. Are you considering in that the fact also that there was a bond issue on it to the extent of fifty-five thousand dollars? A. No, sir.

256

Testimony of Gordon B. Late—Re-direct.

Q10. Then would it have had any value over and above the bond issue at that time? A. I don't believe it would, for a sale proposition.

257

Q11. I will ask you now about the Stone Coal Mine, as of the same time, that is to say if it had been offered for sale upon reasonable terms of payment, the latter part of November or about the time when you had this agreement, and at the time when these deeds were made, what in your opinion could have been realized from the sale of that property? A. I don't think it would have brought the amount of the debts that was against it at that time. I would not have wanted to take it.

Q12. It was also covered by this bond issue the same as the Boat Run Mine? A. I understand there was a fifty thousand dollar bond issue or lien.

Q13. And it also had a vendor's lien to the amount of fifty-five thousand dollars, is that true? A. Yes, sir, fifty or fifty-five thousand dollars.

258

Q14. Now as to the other properties that you referred to as the Lee property, what would have been its value upon the same terms and conditions, and at the same time? A. Well, it did not have any value to me.

Q15. Would it have had any value if offered for sale? A. No, sir, I don't think so, not at that time.

Q16. What about the Volga property at that time, and under the same terms and conditions? A. Well, the Volga property, they did not have any title to the Volga property. It was just a leasehold estate and had not been closed up.

Q17. Just had an option to purchase? A. Yes, sir.

Re-cross Examination by Mr. Tibbetts:

Q1. Do I understand you then, Mr. Late, to say that in your judgment all of this property had no value above the liens and encumbrances against it at that time? A. No, I did not mean to say that, any more than if it was sold at that time it would have taken all that it would have brought to pay the debts.

Q2. Do you know Mr. Late, about what the total encumbrance upon these properties was?

260

A. We understood at that time it was about one hundred thousand dollars.

Q3. Was it more than that? A. It might have been a few dollars more. I know the vendor's lien was fifty thousand dollars and bonds fifty-five thousand dollars, which would make one hundred and five thousand dollars. We had the amount of the bond issue there at the time, but of course we had to take their word for the vendor's lien.

261

Q4. As I understand it then, Mr. Late, the arrangements you have spoken about, made in New York, boiled down, virtually contemplated to transfer this property to apply upon the debts of these persons who were participants in it? A. Yes, with the understanding that they held an option to take the property back.

Q5. And according to the best of your judgment you really did not get anything of value by reason of the transfer? A. No, sir, we did not get anything to apply; that is the fact of the matter.

Testimony of J. M. Stark—Direct.

J. M. STARK, a witness of lawful age, called on behalf of the petitioning creditors, being by me first duly sworn, deposes and says as follows:

Direct Examination by Mr. Law:

Q1. State your name, age and place of residence. A. My name is J. M. Stark, age thirty-four, and residence, Bridgeport, a suburb of Clarksburg.

263 Q2. How far do you live from the City of New York? A. About five hundred miles or a little over.

Q3. In what business are you engaged? A. Coal broker.

Q4. What do you mean by that? A. Buying and selling coal.

Q5. Have you ever had any business transactions with The Diamond Fuel Company of New York City? A. I have.

Q6. What position do you occupy with respect to the Fisher-Summit Coal Company? A. Secretary, Treasurer and General Manager.

264 Q7. I believe you are the chief stockholder, aren't you? A. I am.

Q8. I will ask you to state whether The Diamond Fuel Company is indebted to the Fisher Summit Coal Company, as shown by your books of account. A. They are.

Q9. Have you made an examination of your books and from your books made a statement showing the status of the account between Diamond Fuel Company and the Fisher Summit Coal Company? A. I have.

Testimony of J. M. Stark—Direct.

265

Q10. When did you make up that account? A. Yesterday, December 29th.

Q11. I hand you a paper which you have brought in, and ask you to state what it is. A. It is a statement of the account between the Diamond Fuel Company of New York and Fisher Summit Coal Company, showing the invoice numbers covering shipments made by the Fisher Summit Coal Company to Diamond Fuel Company, as well as credits covering the period from the latter part of August, 1920, to date.

266

Q12. Up to what date? A. Well, the last credit there is given April 5, 1921. Up to the present date, because there has been no credits or shipments since then.

Q13. Has there been any transactions between your company and The Diamond Fuel Company since April 5, 1921? A. There has not.

Q14. What is the total amount of your charges against the Diamond Fuel Company? A. One hundred and ninety-three thousand, three hundred and ninety-six dollars and sixty-one cents.

Q15. What is the credit to which the Diamond Fuel Company is entitled? A. One hundred and twenty-four thousand and seventy-nine dollars and fifteen cents.

267

Q16. What is the balance due from the Diamond Fuel Company to the Fisher Summit Coal Company? A. Sixty-nine thousand, three hundred and seventeen dollars and forty-six cents.

Q17. I will ask you to state what is the balance due you from the Diamond Fuel Company after allowing all credits and set-offs to the time they are entitled—or to which they are entitled. A. Sixty-nine thousand, three hundred

268

Testimony of J. M. Stark—Direct.

and seventeen dollars and forty-six cents, with interest from November 30th, 1920.

Q18. Did you personally examine your books and accounts? A. I did.

Q19. And personally made up this statement from your books and accounts? A. I did.

Q20. Is that statement true and correct? A. That statement is true and correct.

Q21. To the best of your knowledge? A. Yes, sir.

269

Q22. Mr. Stark, were you present in the City of New York at the office of The Diamond Fuel Company the latter part of November, 1920, when a certain arrangement was had there between yourself and Gordon B. Late and others represented by your counsel, D. Stuart Robinson, of Philadelphia, and Diamond Fuel Company? A. I was.

Q23. You have heard Mr. Late's narration of what occurred there. I will ask you to state if his statement is correct, or if you agree with him in what occurred at that time and place. A. His statements were correct.

270

Q24. I now hand you eight certain deeds and agreements which have been filed as a part of the depositions in this case and marked as Exhibits 3 to 10 inclusive, and ask you to examine these deeds and state whether or not these are the original deeds by which the property of The Diamond Fuel Company was conveyed first to Charles S. Chestnut, and then by Charles S. Chestnut to the Barbour-Lewis Coal Company. A. I have, and they are the deeds and agreements.

Q25. State whether or not these deeds were executed in accordance with the agreement and understanding had between the parties at the meeting held in the office of The Diamond Fuel Company in the latter part of November, in the City of New York, and about which Mr. Late has testified, and at which meeting you were present.

Mr. Tibbetts: Question objected to as calling for the conclusion of the witness; and further upon the ground that it has not been shown that the witness was present at the time of the executions of the deeds and knows the facts relating thereto. 272

A. They were.

Mr. Tibbetts: You were not present at the time of the execution of the deeds, were you, in Philadelphia?

A. What do you mean by the execution of the deeds, when they were actually written up and signed and the money transferred? 273

Mr. Tibbetts: Well, were you present in relation to these deeds?

A. I read the deeds over before the meeting down there in the bank, at which meeting I was not present, only by counsel.

274 *Testimony of J. M. Stark—Direct.*

Mr. Tibbetts: So that you did not see the actual transaction of the delivery of the deeds and carrying out of the arrangements, did you?

A. I did not personally see that, no. That was done at the bank.

Q26. You are a stockholder and officer of the Barbour-Lewis Coal Company? A. I am.

Q27. What official position do you occupy with respect to that company? A. Treasurer.

275 Q28. State whether by virtue of these transactions and the deeds in question, the Fisher-Summit Coal Company received anything of value to apply on the credit upon their account? A. Literally, no they did not, if I understand your question right.

Q29. Well, what was the situation there with regard to the exchange of moneys what was the understanding and agreement and which you say has been carried out? A. What the agreement was in New York?

276 Q30. Yes, that has been carried out, and what was done. A. The agreement between ourselves and the other four creditors present at that time, and with our counsel on the one hand and The Diamond Fuel Company and their counsel on the other hand, was that we were to furnish a purchaser for their holdings in West Virginia, who would purchase the property or their holdings in West Virginia for two hundred thousand dollars, and they in turn were to pay the two hundred thousand dollars to we five creditors and we in turn were to take that money and buy the property from the person whom we had supplied

to purchase the property, under a corporation to be organized by ourselves, in order that we would have these holdings down here as a chance of working out part of our claim.

Q31. And what was the person to whom you gave the two hundred thousand dollars to do with the money? A. This money was to replace money which he paid The Diamond Fuel Company for the property. In other words it was to take up his note. He was to give his note for two hundred thousand dollars and take that money and pay to the Diamond Fuel Company and the Diamond Fuel Company to pay that money to us, and we to pay that money to him for his note, leaving no one out anything but the transfer of the property from The Diamond Fuel Company, which were originally The Diamond Fuel Company, was to stand in the name of our corporation.

278

Q32. I will ask you to state whether or not you and the Barbour-Lewis Coal Company are willing and ready to make and execute a proper deed or deeds of conveyance, reconveying the property to the Diamond Fuel Company, or to its trustee in bankruptcy, or to whoever the court may direct you to make such deed? A. Yes, sir.

279

Mr. Law: We now offer in evidence the statement of the account of the Fisher-Summit Coal Company referred to by the witness, and ask that the same be considered with and as part of this deposition, and marked as Exhibit No. 11.

260

Testimony of J. M. Stark—Cross.

Mr. Tibbetts: It is objected to as not the best evidence.

Exhibit No. 11, being the statement above referred to, is here marked and filed.

Cross Examination by Mr. Tibbetts:

281 Q1. Does the statement which you have produced, marked Exhibit No. 11, show all of the credits to which the Diamond Fuel Company is entitled? A. It does, since our former settlement; since the rendering of our first invoice shown on this statement, invoice number 340, dated August 31, 1920.

Q2. Do you agree then with Mr. Late that in this deed transaction at Philadelphia you did not receive anything of value? A. I do.

Q3. Did you receive any part of the two hundred thousand dollars, that is, did your company receive any part of the two hundred thousand dollars that was passed around? A. We did not.

282 Q4. On what terms did you sell this coal to The Diamond Fuel Company? A. Cash in advance, or not later than receipt of my invoices.

Q5. You did not then sell on the usual terms of credit? A. I did not, on that agreement.

Q6. How long after the shipment of coal would the invoices usually be received by The Diamond Fuel Company, if you know? A. I assume thereafter as soon as I could receive their weights and render invoices.

Q7. Would you be able to state as to the coal which you have listed under November 6th

Testimony of J. M. Stark—Cross.

283

when the invoices would have reached The Diamond Fuel Company? A. The invoices on these amounts listed on this statement should have reached The Diamond Fuel Company's office within two days after the date shown on these invoices.

Q8. What do the dates shown on that invoice indicate? A. Indicate the date that the invoice was made out.

Q9. Did you, at times, send out your invoices in advance of the shipment of the coal? A. I did not.

284

Q10. Would the invoices have been made out prior to the time that the Diamond Fuel Company would, in the usual course of carriage, have received the coal? A. Do you mean by that the time the coal was delivered to them at the piers, or the time it first passed into their possession, which is the time when the scale card is first tacked upon the car at the mine.

Q11. What I had in mind was the time it would be received by The Diamond Fuel Company at destination. A. Some of it may have been invoiced before the cars reached Tidewater Exchange, which would have been due to a delay on the part of the railroad company as the cars should have gone straight through from Keyser to Curtis Bay, and reached their destination as soon as the weights could have reached me through the mails, the weights from Keyser.

285

Q12. What is your best recollection of the date that the conference in New York took place? A. The latter part of November.

Q13. Well, it was prior to the 27th of November, wasn't it? About how long prior to that time would you say? A. It was on or before November 27th, probably, as the conference at New York was only laid over or adjourned to Philadelphia, giving time for the preparation of the deeds and other data.

Q14. The deeds you mentioned were prepared after the conference at New York? A. Oh, yes, after the conference at New York. That is where we worked out the agreement, and then the deeds were prepared, and the first time I saw them was after that arrangement, or rather the first time I saw the deeds were in Philadelphia.

Q15. Would you say the conference in New York was as much as one week prior to the time that these deeds bear date? A. I don't know.

Q16. What is your best recollection on that? A. I don't remember the exact number of days.

Q17. What transpired, so far as you know personally, your own personal movements are concerned, between the dates that you were at the conference in New York and the time that you then went to Philadelphia for the execution of these deeds? A. I came back home here and looked after some of my personal affairs, which I had been letting go, because I had been over in New York trying to collect this money.

Q18. Would that in any way refresh your recollection as to about what period of time elapsed between the conference and the day you were in Philadelphia? A. It would not, no.

Q19. It would necessarily have been as much, at least as three or four days, wouldn't it? A.

Testimony of J. M. Stark—Re-direct.

289

I could not say, because I may have left New York on one night, which in fact I did, leave New York on the evening train and got in here on Number Three next morning, and as to whether I went back the same night or a night or two later, I don't know.

Q20. At the time of the conference in New York you had the current transactions with The Diamond Fuel Company, did you not? By that I mean coal was either going forward or you had invoices which had not yet been made up and sent out? A. Coal was not going forward, as I had stopped all shipments before I left here, about the middle of November. However, there was a large part of this coal on which I had not as yet received the weights and had not billed them for it, although the money was due me at that time under our arrangements for cash upon receipt of car number at the estimated capacity of each car.

290

Q21. I understood you to say your terms were cash in advance upon receipt of invoice? A. What I had reference to by cash in advance was cash upon receipt of car number.

291

Q22. It was to be either that or upon receipt of invoice? A. It was to be that or not later than upon receipt of invoices.

Q23. Your last invoice, I notice by this statement, went out December 7th, is that right? A. It did, yes, sir.

Re-direct Examination by Mr. Law:

Q1. Notwithstanding your invoices are dated as late as December 7, 1920, as a matter of fact when you had made your last shipment? A.

292

Testimony of J. M. Stark—Re-cross.

I cannot say without referring to my invoices or car record book, but it was prior to November 15th.

Q2. These debit entries here in this account, as invoices, although running as late as December 7th, were for coal shipped prior to November 15, 1920? A. They were.

Re-cross Examination by Mr. Tibbetts:

293

Q1. These cars which show invoice from November 20th on, had not been received by The Diamond Fuel Company at Tidewater Coal Exchange prior to that date, had they? A. They may have been, as the weights on this coal first came to the operator and then he billed me with the coal before I would get any weight on it.

Q2. Do you know whether they had been or not? A. Without referring to my invoices and files from the railroad company's office, which I have received, I do not.

294

Q3. Ordinarily it would not be true that The Diamond Fuel Company would have received the coal at Tidewater Coal Exchange prior to the dates of your invoices? A. Ordinarily they would have received the coal before I would have received the weights, due to the fact that the coal should go straight through from Keyser to Curtis Bay, while the weights would come by mail from Keyser to the operator, and then he would have to invoice the coal to me, which would be the first time that I would receive the weight, and my invoices would be made as soon thereafter as I could get time to make them up.

Q4. About how long ordinarily, would it take for the weights to come from Keyser through the operator to you? A. They should leave Keyser on the day weighed, reaching the operator in this region the next day, or the day thereafter. The operator would not bill the coal or invoice the coal to me very promptly. Probably the weight would be received by me within a week to ten days from the day the car was weighed in the usual course of business.

Q5. Would it sometimes be less than that? A. It would sometimes be less and sometimes be more. 296

Q6. What is the ordinary time required for transit of coal from Keyser to Tidewater Coal Exchange at Curtis Bay? A. I have never checked up with the idea of trying to remember the length of time required by the railroad company to move a car from Keyser to Curtis Bay.

Q7. What basis did you have for saying then that the car should go from Keyser to Curtis Bay in less time than you would get your weights? A. Because there is not much difference in the distance from Keyser to Curtis Bay, not as much difference as there was from the mines here to Keyser; and I have received weights before now, when I was with an operating company, within three days from the day the car left the mines. 297

Q8. Do I understand from your answer that it is your idea that the car should move from Keyser to Curtis Bay in a period of three or four days? A. It should unless it was sidetracked somewhere.

299

Testimony of J. M. Stark—Re-cross.

Q9. As a matter of practice do you know whether it frequently took more than that? A. I do not.

The further taking of this evidence is adjourned until December 31, 1921, at the same place and between the same hours as noted in the notice.

Given under my hand this 30th day of December, 1921.

299

O. L. HAUGHT,
Notary Public.

300

Case.

On this 31st day of December, 1921, at number 518-520, Goff Building, Clarksburg, Harrison County, West Virginia, the further taking of this evidence is hereby resumed.

APPEARANCES:

DELBERT M. TIBBETTS, of the firm of Kirlin, Woolsey, Campbell, Hickox & Keating, appearing for Canute Steamship Company, Limited, and Compagne Navigazione Sotay Aznar, creditors. 302

J. E. Law, of the firm of Law & McCue, counsel for J. E. Law and A. F. McCue, partners, intervening petitioning creditors, and for the Morgantown Coal Company, a corporation, intervening petitioning creditor.

Mr. Law: Notice is called to the fact that in the beginning of this testimony it was dictated on the record that J. E. Law appeared for Gordon B. Late, and Gordon B. Late Coal Company, the Fisher-Summit Coal Company and H. J. Berry. This statement on the record, and appearance so noted was inadvertently made and the said J. E. Law now states on the record that he does not, nor does the firm of Law & McCue, attorneys, represent or appear for said Gordon B. Late or Gordon B. Late Coal Company, or the Fisher-Summit Coal Company or H. J. Berry. 303

CHARLES P. SWINT, a witness of lawful age called on behalf of the petitioning creditors, being by me first duly sworn, deposes and says as follows:

Direct Examination by Mr. Law:

Q1. Mr. Swint, state your name, age and occupation, and place of residence. A. Charles P. Swint, practicing attorney at Weston, West Virginia; age, forty-six; residence, Weston West Virginia.

Q2. How far do you live from the City of New York, approximately? A. About five hundred miles.

Q3. You are engaged in the practice of law I believe? A. Yes, sir.

Q4. I will ask you if you know what is termed as the Stone Coal Mine situate near Weston? A. Yes, sir, I am somewhat acquainted with the property.

Q5. About how far from Weston is it? A. A mile and a half from the center of town.

Q6. Did you have an occasion as Commissioner of the Circuit Court of Lewis County, in a suit in chancery, to make sale of that property recently? A. Yes, sir, I had a chancery suit for the enforcement of a purchase money lien, and I was appointed commissioner and sold the property.

Q7. What was the title of that suit? A. Stone Coal Company, a corporation, against Diamond Fuel Company, a corporation, and Charles S.

Chestnut. After the suit had been instituted there was a deed recorded in the office conveying this property from Charles S. Chestnut, to whom it had been conveyed by The Diamond Fuel Company, a short while before, to the Barbour Lewis Coal Company, and the bill was amended bringing in the Barbour-Lewis Coal Company.

Q8. Of what did this plant consist, generally?

A. Consisted of a tract of about sixty-eight acres of coal of the Red Stone stratum, less the amount, perhaps, that had been mined out. The original tract was sixty-eight acres and a tippie and siding, and I think some electrical appliances; and then in addition to that I believe there was about five acres of ground around the plant that was conveyed to the concern, and a further mining lease on a Bennett tract of about two hundred and some acres which was under lease on a royalty basis, with a minimum royalty. 308

Q9. What was the amount that was sought to be recovered in this suit? A. One note of fifteen thousand dollars and two notes of twenty thousand dollars each and the accrued interest; and on the day that the decree of sale was entered on July 6, 1921, this sum aggregated about fifty-six thousand dollars. It was fifty-five thousand dollars with accrued interest from the 4th day of August, 1920. 309

Q10. That was represented by a vendor's lien? A. By a vendor's lien on the property.

Q11. And it was sold to satisfy this lien? A. Yes, sir.

Q12. How much did the property bring at the sale? A. Forty-three thousand dollars. Bid in

310

Testimony of Charles P. Swint—Direct.

by the original land owner. There was a receiver appointed in January or February, 1921, I think.

Q13. Prior to your sale you say there was a receiver. The property was in the hands of a receiver? A. Yes, sir.

Q14. When was the receiver appointed? A. Appointed in the early days of February, 1921, or probably about the 5th.

311

Q15. Have you, as such Commissioner, made and executed a deed for the conveyance of that property A. I have not formally executed the deed. The costs of sale and receivership amounted to right at six thousand dollars, and the decree confirming the sale directed that upon the payment of these costs by the purchaser that the balance of the purchase money be credited on this lien, so that it would not be required to pay in this fund and pay it right back to them, and they paid that costs, and upon the payment of that I was directed to make a deed, but I have neglected and have not done it.

312

Q16. They have paid the costs? A. Yes, sir, and the only reason the deed has not been executed is my carelessness. I was engaged in other matters and did not attend to it. The purchaser took possession of the mine.

Q17. They have since been in possession? A. Even since the sale was confirmed, yes.

Q18. When was that sale made by you? A. On the 27th day of September, 1921. It was first advertised for the 30th day of August, and there not being sufficient bidders, and some of the bidders there desiring—I think all the bidders desired postponement, desired a continu-

*Testimony of Gordon B. Late—Recalled—
Re-cross.*

313

ance to make some combination to purchase it, and it was adjourned until September.

Q19. Was that sale afterwards confirmed by the court and deed ordered to be made? A. Yes, sir.

Q20. When was it confirmed? A. It was confirmed on the 7th day of November, 1921. No, it was confirmed on the 19th day of October, 1921.

Q21. By that sale was all the interest that the Diamond Fuel Company owned in that plant of coal and leasehold estate sold? A. Yes, sir.

314

Cross Examination by Mr. Tibbetts:

Q1. When was this action you have mentioned, commenced? A. In January I think. The bill was filed at February rules and suit instituted sometime in January. I don't think I have the date here.

315

GORDON B. LATE, recalled, testifies as follows:

Re-cross Examination by Mr. Tibbetts:

Q1. When the arrangement you mentioned was made in New York for the transfer of certain properties in West Virginia, you stated that the transaction was the form of a money trans-

316 *Testimony of Gordon B. Late—Recalled—
Re-cross.*

action, but that the title was really to be taken over so that it would be held by a corporation for the benefit of yourself and associates. What credits were your company to make on account of this transaction? A. Credits in proportion to the amount of money that was owing to me by the Diamond Fuel Company.

Q2. Do you remember what that would amount to in the case of your own company? A. No, sir, I do not.

317 Q3. Would one hundred and eight thousand, nine hundred and four dollars and eight-five cents be approximately the amount? A. It would be something in the neighborhood of one hundred thousand dollars. I don't just recall the exact figures.

Q4. That is to say your company held about half of the amount that was then in contemplation? A. Yes, sir.

318 Q5. Is it your understanding that so far as money transactions were concerned it was really just a wash transaction. I mean to say there was not any money actually paid over to The Diamond Fuel Company which was in turn paid back to yourself and those associated with you, was there? A. No, sir.

Q6. So that whatever benefit, if any, you were to get out of the transaction, would be on account of such value as there might be in the property that was to be transferred, is that correct? A. Well, I don't think that we expected to get anything of value in the property anymore than we was trying to get something that we could get some money out of as quickly as

*Testimony of Gordon B. Late—Recalled—
Re-cross.*

319

possible in order to protect our creditors, and we figured we might be able to work something out of the property if we could get possession of it and ship some coal.

Q7. By protecting your creditors, who do you refer to? A. People we owed for coal that we had purchased.

Q. Did all parties seem to think it would also be advantageous in the interest of the Diamond Fuel Company to make this transaction? A. I don't know that that was discussed, anymore than the Diamond Fuel Company claimed that they would be able to take care of it, and retained an option in this sale, so that it was not considered to be a definite out and out transfer.

320

Q9. It was not considered to be and out and out transfer, but only a transfer with an option by which the Diamond Coal Company could take it back? A. Yes, that is what it was.

Q10. Did you at that time commence any proceedings for the collection of the amount due you and your company, or were you contemplating such proceedings? A. No. This was at the time we first heard of the trouble of the Diamond Fuel Company. The transaction was all made right at that time when we first knew about it.

321

Q11. Well, would you have taken some action to have protected your interests if this transfer had not been made? That is, had you considered that question? A. No, sir, we had not considered it, because we did not know what the conditions were.

Q12. Did you actually make an entry or a credit for approximately one hundred thousand

322 *Testimony of Gordon B. Late—Recalled—
Re-cross.*

dollars, or any other amount, on account of this transaction? A. No, sir, I did not.

Q13. Do you know whether your associates did or not? A. I do not, no, sir.

Q14. Well, did you in fact withhold taking any proceedings against the Diamond Fuel Company for the collection of your account in view of the transfer of the property that was made? A. Yes, on the account of this option that they retained.

323 Q15. Am I right in supposing that in consideration of this transfer you, and those associated with you, either agreed or concluded to not further press your obligations at that time? A. Yes, I think that was the understanding.

Q16. Did you know when the petition in bankruptcy was filed in this case. In other words did you know of the fact that the petition was going to be filed at or about the time it was filed? A. No, sir.

324 Q17. Do you know the petitioning creditors or persons connected with them, that is the Pittsburgh & West Virginia Coal Company, H. M. Crawford Coal Company and Boulder Coal Company? A. I only know the gentleman that claims to represent the Pittsburgh & West Virginia Coal Company. I am not acquainted with the other two.

Q18. Who is this gentleman? A. Why his name is Thomas F. Barrett.

Q19. Do you know any one connected with the Crawford Coal Company? A. No, sir. I have met Mr. Crawford.

*Testimony of Gordon B. Late—Recalled—
Re-cross.*

825

Q20. Do you know whether Mr. Barrett purported to represent the Crawford Coal Company? A. Yes, sir.

Q21. And also the Boulder Coal Company? A. Yes, sir.

Q22. Do you know any one else connected with the Boulder Coal Company? A. I do not.

Q23. In what way did you meet Mr. Barrett? A. Why in connection with the claim that he has against me from the VonBlack Coal Company.

Q24. Did he ever discuss this Diamond Fuel Company matter with you? A. He tried to several times.

326

Q25. Was that before or after he filed a petition in bankruptcy? A. Why before and after both.

Q26. What was said between yourself and Mr. Barrett before the petition was filed? A. There was not anything said by me, and I would not undertake to go into his conversation, because Mr. Barrett is a man that talks a great deal and very rapidly, and his conversation is not of a character that I would try to retain any of it.

327

Q27. Was the original petition filed with your assent or approval? A. It was not.

Q28. You know the Morgantown Fuel Company or Coal Company, do you not? A. Yes, sir.

Q29. Did you know that that company had filed an intervening petition in bankruptcy? A. I did, yes, sir.

Q30. Was that discussed with you before that petition was filed? A. It was.

Q31. What, if anything, did you have to do with the filing of that petition? A. I did not have anything to do with it.

328 *Testimony of Gordon B. Late—Recalled—
Re-cross.*

Q32. Did you object to its being filed? A. I did not.

Q33. Do you know how it came about that the Morgantown Fuel Company came in as an intervening petitioning creditor? A. My understanding is that they came in the file their claim along with others in the bankruptcy proceeding in New York so that they would be represented in this proceeding.

329 Q34. Well did you or persons acting for you as attorneys or otherwise, in any way bring this matter to the attention of the Morgantown Fuel Company, or seek to interest them in taking part in the proceedings? A. Well, I don't remember whether I mentioned the matter to the Morgantown Coal Company or not, but I think I called Mr. Taylor's attention to it.

Q35. Who is Mr. Taylor? A. He has charge of the Morgantown Coal Company, as I understand it.

330 Mr. Law: He is the fellow who was on the stand yesterday?

A. Yes, sir.

Q36. At that time did you and your associates come to a conclusion that you would like to have an adjudication in bankruptcy against the Diamond Fuel Company? A. We did.

Q37. And were you doing what you could to assist in securing such an adjudication? A. Yes, I was.

Q38. Did you know to what extent those associated with you were taking the same interest? A. I do not, no, sir.

Testimony of Gordon B. Late—Recalled— 331
Re-cross.

Q39. Did you ever talk with any of them about it? A. I talked to Mr. Stark about it, of the Fisher-Summit Coal Company.

Q40. Did you ever talk to any one else? A. Yes, sir, talked with Mr. Law and Mr. Watson.

Q41. Did you talk to Mr. Law with the purpose of interesting him in taking part in these proceedings looking towards an adjudication? A. No, sir I don't know that I did. He was interested in it himself. He was one of the creditors of the Diamond Fuel Company, and in that way we took the matter up. 332

Q42. Did you first go to Mr. Law, or he came to you in regard to the matter? A. I cannot say as to that, but it was here in Mr. Law's office that the matter was discussed.

Q43. Who else with whom you have been associated in this matter did you discuss this matter with, if that is the case, for the purpose of assisting in securing an adjudication? A. I talked, as I have said, to Mr. Stark of the Fisher-Summit Coal Company and also to my attorney. 333

Q44. Ever talk to Mr. Berry? A. H. J. Berry?

Q45. Yes. A. Now, Mr. Berry was present in the Fisher-Summit office one day when we discussed the matter, and also Mr. Showalter.

Q46. Whose company is represented by Mr. Showalter? A. Why I think he represents the Westwood Coal Exchange.

Q47. Did you ever communicate or talk with persons connected with the Seaboard Coal Company or Seaboard Fuel Company? A. Yes, sir, I have talked with them but I don't think it was

334 *Testimony of Gordon B. Late—Recalled—
Re-cross.*

about this bankruptcy proceeding. They are one of the creditors of The Diamond Fuel Company and have been present at the meetings held by the creditors here.

335 Q48. Have I now covered the names of all these you have heretofore said were associated with you at the time of the conveyance in New York looking towards the transfer of the properties of the Diamond Fuel Company? A. You mean in these last names?

Q49. Yes. A. No, I don't think you have.

Q50. Who else? A. Mr. S. J. Livingstone was there.

Q51. Have you discussed with Mr. Livingstone the matter of doing what could be done in the matter of securing an adjudication of this matter? A. No, sir, I have not.

Q52. Is there any one else whom I have omitted? A. Well, Mr. W. I. Booth was present at the time I talked to Mr. Stark of the Fisher-Summit Coal Company.

336 Q53. And who did Mr. Booth represent? A. Well, I don't know.

Q54. Does he represent some party who was to secure some hope for benefit in connection with the transfer of the West Virginia properties? A. My understanding is that he is helping Mr. Stark, but I do not know that to be a fact.

Q55. From the conversations that you have had with the various persons you have mentioned, is it your understanding that before, and has been since at or about the time the intervening petition was filed, the desire of those

Testimony of Herbert M. Crawford—Direct. 337

parties to do what may be possible to secure an adjudication in bankruptcy in this case? A. The desire of which parties do you mean?

Q56. The ones to whom you have talked, as related in your previous answers. A. Yes, sir, it is.

Mr. Charles B. Johnson: At this time came H. M. Crawford, who is president of the H. M. Crawford Coal Company, the last named being one of the original petitioning creditors. I now desire to appear on the record as counsel for H. M. Crawford Coal Company, the original petitioning creditor, with notice that all notices hereafter going to this company shall be directed to me, when such notice run to counsel for the last named company. My name is Charles B. Johnson, my address is Clarksburg, West Virginia. 338

HERBERT M. CRAWFORD, a witness of lawful age called on behalf of the intervening creditors, being by me first duly sworn, deposes and says as follows: 339

Direct Examination by Mr. Law:

Q1. State your name and age and place of residence, Mr. Crawford? A. My name is Herbert M. Crawford; age, fifty-four; residence Philippi, West Virginia.

340 *Testimony of Herbert M. Crawford—Direct.*

Q2. How far do you live from the City of New York, approximately, by rail? A. About five hundred miles.

Q3. How are you connected, if any way, with the H. M. Crawford Coal Company? A. I am president of that company.

Q4. Is it a corporation? A. It is.

Q5. In what business have you been engaged? A. Engaged as coal operator, mining and shipping coal.

341 Q6. Has your company ever had any business relations with the Diamond Fuel Company of New York? A. Yes, sir.

Q7. In what did those relations consist? A. On November 1, 1920, we sold them five cars of coal. I think it was five.

Q8. Have they paid you for that coal? A. They have not.

342 Q9. You have here what appears to be a memorandum of coal shipped. I will hand it to you and ask you to state what it is? A. These are copies of the original bills forwarded to Diamond Fuel Company the bills of the coal that was shipped them, or invoices possibly.

Q10. Does this show the date of the invoice? A. It does.

Q11. The initial and car number? A. It does.

Q12. The pounds of weight contained in each car? A. It does.

Q13. The price at which it was sold? A. It does.

Q14. And the amount of each car, or, its invoice? A. The amount of each invoice. In one invoice there is three cars totaled, and another invoice one car each.

Testimony of Herbert M. Crawford—Direct. 343

Q15. Do you have with you the original of these orders? A. I do not.

Q16. Do these transactions represent or include all the transactions you have had with the Diamond Fuel Company? A. I am not sure. Those are the last transactions. We may have had some previous to that, sometime before that, but I don't remember. I think not, however. I think they were the only transactions.

Q17. If you had any prior to this they were closed? A. Yes, sir, they were. I believe these 344 are the only transactions.

Q18. I will ask you to state what is due you, or what is due the H. M. Crawford Coal Company from the Diamond Fuel Company? A. Sixteen hundred and fifty-three dollars.

Q19. Is that balance due, owing and unpaid? A. It is.

Q20. In arriving at that balance have you allowed the Diamond Fuel Company any credit on this to which it is entitled in connection therewith? A. I have allowed them no credit. They are not entitled to any.

Q21. When did this account become due? A. 345 I am not sure, but I think on the 15th of December.

Q22. It became due then the 20th of the month following the shipment? A. We usually say the 20th, although in our invoices we state the 15th. In this case it would be the 15th of December.

Q23. Then this amount should draw interest from what date? A. From December 15th I should say, 1920.

Q24. Mr. Crawford, you are one of the persons, or your company, who joined in the orig-

346 *Testimony of Herbert M. Crawford—Cross.*

inal petition in bankruptcy in this case against the Diamond Fuel Company? A. Yes, sir.

Mr. Law: We now offer in evidence and ask to be filed with and as part of these depositions the invoices of the H. M. Crawford Coal Company to the Diamond Fuel Company, showing the shipments, etc. of coal, and from which the witness has testified, and ask that it be marked as Exhibit No. 12.

347

Mr. Tibbetts: The offer is objected to as not the best evidence and no proper foundation having been laid for the introduction of secondary evidence.

Exhibit No. 12, being the invoices above referred to, is here marked and filed.

Cross Examination by Mr. Tibbetts:

Q1. These documents which you have submitted, Mr. Crawford, the pencil copies made up by you recently, are they? A. They were made up last evening from the original invoices.

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Q2. In what manner was this coal ordered? A. It was ordered over the telephone from the office of the Diamond Fuel Company at Fairmont.

Q3. Who was the individual that made the order? A. Well, the manager of the office I presume. It is possible that the order followed confirming it, but I am not sure. At that time we were selling coal mostly over the telephone.

Q4. Did you take the order yourself? A. I presume I did.

Q5. Do you definitely recall the particular transaction? A. I haven't much doubt but what I took the order, as no one would be authorized to accept an order at that time from the Diamond Fuel Company, I would think. I know they would not unless we had been shipping them coal previous to that, and I don't believe we had. I do not recall exactly the circumstance of the order, except that I remember that it came over the 'phone.

Q6. Were you ever in the office of the Diamond Fuel Company in Fairmont? A. Yes, sir. 350

Q7. Do you know what the personnel of that office consisted of? A. No, I do not.

Q8. Do you recall the names of any of the persons who were in that office? A. Well, I have seen Mr. Watson there, but I don't recall any of the others.

Q9. Do you know whether this order came from Mr. Watson or not? A. I do not.

Q10. Have you any evidence other than your recollection that the telephone order come from the office of the Diamond Fuel Company at Fairmont? Who was the party ordering this coal? A. Nothing more than it was the Diamond Fuel Company. 351

Q11. Could you state more than that some person called up over the telephone from Fairmont directing that certain coal should be shipped in the name of The Diamond Fuel Company? A. I could not now, unless I would in looking over the records, I could find a confirming order. Sometimes they were sent and sometimes they were not.

352 *Testimony of Herbert M. Crawford—Cross.*

Q12. If you can find such confirming order are you willing to bring it in or send it to this office so that it may be made a part of this record? A. I will. However, the greater part of the coal we were selling then, we were selling over the telephone, and frequently never received any orders at all.

353 Q13. Have you expended any money in connection with the prosecution of this bankruptcy proceeding, or has your company? A. No more than traveling expenses. I was over here once or twice.

Q14. Do you know who advanced the money necessary to start proceedings? A. I do not.

Q15. How was the matter brought to your attention that it was desired to start bankruptcy proceedings in this case? A. It was either through Mr. Barrett or Mr. Johnson, I don't recall just now.

Q16. By Mr. Johnson, you mean your attorney now in this room? A. Yes, sir, C. B. Johnson.

354 Q17. Do you know, Mr. Crawford, what party or parties were really back of the idea of bringing the bankruptcy proceedings? A. What parties were talking of it?

Q18. Yes, that is to say who was instigating it? A. I only know of the Pittsburgh & West Virginia Coal Company and the Boulder Coal Company, the other two petitioners.

Q19. Had you taken action of any character prior to the commencement of the bankruptcy proceeding in an effort to collect your account? A. No more than—

Q20. I mean legal action. A. No legal action, no. I have been to the office once or twice to

Testimony of Herbert M. Crawford—Re-direct. 355

talk the matter over with some of the parties there, some of the office force of the Diamond Fuel Company. We considered that the account was lost and did not want to spend any more money.

Q21. Well, did you make it known at the time these proceedings were commenced that you would not spend any money in the prosecution of these proceedings? A. No, sir, I never—you mean of the bankruptcy proceedings?

Q22. Yes. A. No, I think I never made any statement of that kind. 356

Q23. In other words, was your agreement with those who discussed it with you that you would allow the name of your company to be used as one of the petitioning creditors, but without expense or obligations upon your company, for the benefit of whom it might concern? A. Well, I think I was told that there would be none, possibly no considerable expense, or possibly none at all, I don't remember. Of course, I expected to take care of our attorney in the matter, Mr. Johnson. Is that what you mean? 357

Q24. Well I am wanting to know just exactly what the arrangement was at the time you entered these proceedings, and if you have answered it that is all I ask for. A. Well, I have.

Re-direct Examination by Mr. Johnson:

Q1. Did you consult me as your attorney about this claim? A. Yes, sir.

Q2. Upon whose advice did you go—did your company act when you became a petitioner? A. On your advice.

358 *Testimony of Herbert M. Crawford—Re-direct.*

Re-direct Examination (Continued) by Mr. Law:

Q1. Did you write to the Diamond Fuel Company at New York, or send them statements or billings for this coal? A. I believe not.

Q2. Did you ever have any letter from the office at New York concerning it, or concerning the account? A. I believe not. I think the only people I talked with or took it up with was the Fairmont office. I may have some communications from them in the office, but I don't just recall now.

359

Mr. Law: I wish you would look if you have and send it down with the other matter.

Re-cross Examination by Mr. Tibbetts:

Q1. Do you know whether Fairmont is the office of The Diamond Fuel Company or The Diamond Operating Company? A. I always understood it was the office of both companies, the Operating Company as well as the Fuel Company.

360

Q2. You knew, did you, that they were separate companies, such as I have mentioned? A. Yes. They were buying coal in that office for The Diamond Fuel Company and I naturally supposed that was their headquarters.

Re-direct Examination by Mr. Law:

Q1. As a matter of fact you don't know whether the Diamond Fuel Company maintain

Testimony of Herbert M. Crawford—Re-cross. 361

an office at Fairmont or not. You only know that somebody was buying coal for the Diamond Fuel Company? A. Yes, sir.

Q2. And it was through that office or someone there that you made your sale? A. Yes, sir.

Re-cross Examination by Mr. Tibbetts:

Q1. You cannot say from your own knowledge that it came from that office, can you, if the order came over the telephone? That is, you would not have any means of knowing just where the message came from, would you? A. Yes, sir. Well, the party talking may have stepped into another office, but it was from Fairmont and it was bought in the name of the Diamond Fuel Company. 362

Q2. That is to say the party speaking to you said that he was representing the Diamond Fuel Company, is that your meaning? A. Yes, sir, he represented the Diamond Fuel Company.

Q3. You have no other knowledge except what might have been said over the telephone by that person? A. I say I might have a confirming order at the office, I don't know. There is no question in my mind at all. It was the Diamond Fuel Company. Possibly some of our office men would be acquainted with the personnel of the office there, but personally I was not. 363

HARRY C. OWEN, a witness of lawful age called on behalf of the petitioning creditors, being by me first duly sworn, testifies as follows:

Direct Examination by Mr. Law:

Q1. State your name and age and place of residence. A. Age, thirty-seven; assistant manager and assistant secretary of the Morgantown Coal Company.

365 Q2. Where do you live? A. Morgantown, West Virginia.

Q3. How far is your residence at Morgantown from the City of New York? A. Four hundred and eighty-nine miles, or four hundred and ninety-nine. I don't think it takes quite a five hundred mile book to get to New York City.

Q4. Are you acquainted with M. L. Taylor who was examined as a witness in this case on yesterday? A. I am.

Q5. What is his position in your company? A. Vice-president and general manager.

366 Q6. I will ask you to state whether your company, the Morgantown Coal Company, has had any dealings with the Diamond Fuel Company recently, and if so state about when. A. Well, we had quite a few transactions with them. The first transactions we had during 1920, was on July 27th, when I bought a car of coal from them, or I bought three cars of coal from them on July 27th, and on July 28th I bought some, and on August 2nd and on August 9th and on August 10th and on August 27th, and October

Testimony of Harry C. Owen—Direct.

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14th and October 20th and October 21st and 22nd and on October 14th I sold them some coal.

Q7. I hand you a memorandum that has been offered in evidence as Exhibit No. 1 by the testimony of Mr. Taylor, and ask you what it purports to be. A. Statement of their account as shown by our books.

Q8. Have you examined their account as shown by your books? A. Well, Mr. Baumgartner, who is here, will testify to that. He is the treasurer.

Q9. Who keeps these books? A. Mr. Baumgartner is responsible for them. He is the treasurer and auditor.

368

Q10. In these coal sales to The Diamond Fuel Company, or in your purchase from The Diamond Fuel Company of coal, who conducted the sales or purchases? A. I did.

Q11. From your office at Morgantown? A. Yes, sir.

Q12. And with whom did you conduct these sales? A. With Mr. Harry J. Hawkins.

Q13. Where? A. At Fairmont, West Virginia.

369

Q14. And then these transactions were made by you on behalf of The Diamond Fuel Company with Harry J. Hawkins, who was the purchasing agent of The Diamond Fuel Company at Fairmont?

Mr. Tibbetts: I object to that as leading and suggestive.

A. I don't know what position Mr. Hawkins had with them, but I bought and sold coal for

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Testimony of Harry C. Owen—Cross.

Mr. Hawkins and all the invoices that I received from Diamond Fuel Company came from 25 West Forty-third Street, New York City.

Q15. You bought some coal from the Diamond Fuel Company too, I believe? A. Yes, sir.

Q16. And sold them some? A. Yes, sir.

Q17. When you sold them coal who would you sell it through? A. Mr. Hawkins.

371

Q18. And when you purchased coal from them through whom would you purchase it? A. Mr. Hawkins.

Q19. And your invoices, where were they sent? A. They were sent to Fairmont and forwarded to New York from that point.

Q20. And the invoices of The Diamond Fuel Company for the coal it sold to you were received from where? A. New York.

Q21. What position is Mr. Taylor in with respect to the position you occupy? A. Well, he is my superior officer, as it were.

Q22. Mr. Taylor is your superior officer? A. Yes, sir.

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Q23. And then whatever you did was done under his supervision and direction? A. Yes, sir.

Cross Examination by Mr. Tibbetts:

Q1. Did you have anything to do with the arrangements that were made for your company to become one of the intervening petitioning creditors in this case? A. I did not.

Q2. Do you know who did? A. I do not unless there is a letter in here from Governor Glasscock, our attorney.

Testimony of E. S. Baumgartner—Direct.

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Q3. Do you have knowledge of what the arrangements were for the Morgantown Coal Company to become a party? A. Only with the hope of getting all or part of our claim against them.

Q4. Do you know at whose request, other than your attorney's, this was done? A. No, I cannot say that I do.

Q5. Do you know whether your company has advanced any money in the way of expenses in connection with this proceeding? A. I do not, no, sir.

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Q6. Would you know it if it had? A. No.

Q7. Who would? A. Mr. Baumgartner would be the one.

E. S. BAUMGARTNER, a witness of lawful age, called on behalf of the petitioning creditors, being by me first duly sworn, deposes and says as follows:

375

Direct Examination by Mr. Law:

Q1. Where do you live? A. Morgantown.

Q2. How far is it from Morgantown to New York? A. I cannot answer you accurately.

Q3. Approximately? A. [Four to five hundred miles.

Q4. Are you acquainted with the Morgantown Coal Company? A. Yes, I am.

Q5. In what respect? A. As treasurer and auditor.

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Testimony of E. S. Baumgartner—Cross.

Q6. Have you, as such treasurer and auditor, had any occasion to examine their books and to make up a statement respecting the claim of the Morgantown Coal Company against The Diamond Fuel Company? A. Yes, I have.

Q7. I hand you a memorandum here which has been offered in evidence as Exhibit No. 1, and ask you to state what it is. A. It is a statement of the account of Morgantown Coal Company, our company, against the Diamond Fuel Company, which was prepared by myself on December 28, 1921, and duly sworn to as treasurer of the Morgantown Coal Company.

Q8. I will ask you to state if that statement represents the true state of the account between the Diamond Fuel Company and the Morgantown Coal Company? A. Yes, it does.

Q9. In that have you allowed them all the credits to which they are entitled for money paid or coal shipped, or in any other manner? A. Yes, sir.

Q10. What is the balance due the Morgantown Coal Company from Diamond Fuel Company?

A. The balance due, exclusive of interest to date, is sixteen hundred and thirty-one dollars and eleven cents, plus the interest, one hundred and sixteen dollars and fourteen cents, totalling seventeen hundred and forty-seven dollars and twenty-five cents.

Cross Examination by Mr. Tibbetts:

Q1. Why didn't you bring your ledger and other books of account in on this, Mr. Baumgartner? A. Well, I brought my ledger sheets,

the loose leaf system, which embraces the account in full, which is all that I was requested to bring.

Q2. What other books would contain a record of these transactions? A. Well, nothing further than the sales and purchase book upon which our copies of invoices are entered on our sales book, and upon which our invoices received are entered on our purchase book.

Q3. Do you have a journal? A. Yes, sir.

Q4. Which is the book of original entry, the sales book or journal? A. You mean with respect to these invoices? 380

Q5. Yes. A. Well, the sales and purchase book are the books of original entry for the invoices, except in a case where it is necessary to make a journal entry, then the journal becomes the book of original entry.

Q6. Have you seen or do you have possession of the correspondence of the company? A. You mean at this time?

Q7. No, in the course of your business as treasurer of the company. A. Not more so than any other member of the firm. 381

Q8. Have you seen, or do you have in your custody, a letter from the attorneys of the company in regard to the commencement of the bankruptcy proceedings in this case? A. Attorneys of which company?

Q9. Morgantown Fuel Company or Coal Company, or whatever you call it. A. I have seen that letter, but I do not have it in my possession at this moment.

Q10. I mean the letter from Mr. Glasscock. A. From Mr. Glasscock to the attorneys here, Law & McCue.

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Testimony of E. S. Baumgartner—Cross.

Q11. I understood you had a letter from Mr. Glasscock to the Morgantown Coal Company. A. I am not so positive as to that. I can cite you one thing from memory in that connection though, if you care to have me. I do recall of Governor Glasscock calling me into his office and informing me, and requesting that we write a letter to Law & McCue, and I remember writing that letter to Law & McCue, but I do not have a copy of it with me. We consented in that letter, to entering into this arrangement, under certain conditions.

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Q12. What was the arrangement? A. The arrangement was that we would enter into it providing there were no costs or attorney's fees to be borne by our company, as we had our attorney in Morgantown who looked after our legal questions generally, and it was under those arrangements that we consented to enter into this agreement.

Q13. Is Mr. Glasscock an attorney, locally, for the company, regularly? A. Yes, sir.

384

Q14. Do you know at whose request he discussed the arrangements with you, or wrote the letter in regard to the arrangements? A. I could not say positively, but it occurs to me that the matter had been taken up with him by Law & McCue.

Q15. Were you given to understand that this proceeding was in reality for the benefit of other persons who had larger interests to protect than your company had? A. No, I cannot say that I was given to understand that, nothing more than that their interests were to be protected along with ours, as far as it could be done.

Testimony of Anthony F. McCue—Direct.

385

Q16. Whose interests do you refer to? A. The other creditors that Governor Glasscock mentioned to me at the time.

Q17. Who were they? A. I remember Gordon B. Late and Fisher-Summit Coal Company being two of them, and whether there were others I don't recall, but I do remember them.

Q18. Have you expended any money in connection with the prosecution of this action? A. No, sir, we have not, nothing further than our expenses in coming to Clarksburg.

386

ANTHONY F. McCUE, a witness of lawful age, called on behalf of the petitioning creditors, being by me first duly sworn, deposes and says as follows:

Direct Examination by Mr. Law:

Q1. You may state your name, age and place of residence. A. A. F. McCue, thirty-eight, Clarksburg, West Virginia.

387

Q2. How far do you live from the City of New York? A. More than three hundred miles. I do not know what the distance is.

Q3. How are you engaged in business? A. Engaged in the practice of law in partnership with J. E. Law under the firm name of Law & McCue.

Q4. How long have you been engaged in such association and partnership? A. Since February, 1918.

Q5. As such attorneys at law have you had any business relations with The Diamond Fuel Company, professionally, I should say? A. Yes, sir.

Q6. What did such relations generally consist of, was it services in the office or outside? A. Both in the office and New York and in Charleston, West Virginia.

Q7. I hand you, Mr. McCue, what purports to be an itemized statement of the services rendered The Diamond Fuel Company by the firm of Law & McCue, a part of which was rendered by J. E. Law, and a part of which was rendered by A. F. McCue, beginning with August 8, 1919, and ending on September 29, 1920, and showing as well one item of credit as of August 27, 1919. I will ask you to look at that statement and state whether it is a true and correct statement from your books of account of Law & McCue of Clarksburg. A. It is. I have the original book of entry before me and have compared it and find it to be an exact copy.

Q8. Who keeps that book of account, and in whose handwriting is it? A. Part of it is in mine and part of it is in the handwriting of J. E. Law.

Q9. From that book of account and as well from the account that is here presented, what is the balance due the firm of J. E. Law and A. F. McCue? A. Two thousand, seven hundred and forty-two dollars and fifty cents.

Q10. Is that after allowing all the credits and sets off and counter claims that The Diamond Fuel Company is entitled to? A. It is.

Testimony of Anthony F. McCue—Cross.

391

Mr. Law: We now offer in evidence this memorandum as part of the deposition in this case, and ask that it be marked Exhibit No. 13.

Exhibit No. 13, being the statement above referred to, is here marked and filed.

Cross Examination by Mr. Tibbetts:

Q1. The firm of Law & McCue are acting as attorneys for certain intervening petitioning creditors in this case, are they not? A. We file our claim and are asking to be made one of the petitioning creditors.

392

Q2. Do you not also represent the Morgantown Coal Company in that action? A. Yes, sir.

Q3. Do you know what arrangements have been made as to a fee to be paid to your firm in connection with these proceedings? A. I do not.

Q4. Do you know whether or not the Morgantown Fuel Company has agreed to pay your firm anything? A. I do not. I assume they have, however, because we do not usually work for nothing. Mr. Law has conducted this business.

393

Recess taken until one-thirty o'clock
P. M.

394 *Testimony of Herbert M. Crawford—Recalled—
Redirect.*

At one-thirty o'clock P. M. the further taking of this evidence is hereby resumed.

HERBERT M. CRAWFORD, recalled testifies as follows:

Re-direct Examination by Mr. Law:

395 Q1. You are the same Herbert M. Crawford who was examined this forenoon? A. I am.

Q2. What business do you say you are engaged in Mr. Crawford? A. Coal operator.

Q3. Do you mine and produce coal? A. Mine and produce coal, yes, sir.

Q4. How long have you been engaged in that business? A. About twenty years.

Q5. Where is your plant? A. One at Arden and one at Clements, West Virginia.

396 Q5. What is the character of coal produced from your Arden plant? A. It is the Kittaning vein, and sometimes called the upper Freeport.

Q7. Are you acquainted with the plant owned by the Diamond Fuel Company at or near Arden? A. Yes, sir, to a certain extent.

Q8. How close is that plant to yours? A. It joins us.

Q9. That plant there of the Diamond Fuel Company is known generally as the Boat Run Mine? A. Yes, sir.

Q10. How long have you been operating in that region? A. Since 1908.

Testimony of Herbert M. Crawford—Recalled— 397
Re-direct.

Q11. Are you acquainted with the acreage owned there by the Diamond Fuel Company?

A. I understand that it was originally fifteen hundred acres, but I believe part of that has been sold off at the upper end. I don't know how much.

Q12. Do you know about what the acreage is now? A. No, I do not.

Q13. You say there was originally about fifteen hundred acres? A. Yes, sir, that is my understanding. 398

Q14. And some of it has been cut off, and is now known as what? A. Well, the Lee Collieries Company had a lease just above our mine on the upper end of this, and that was cut off of this original fifteen hundred acres.

Q15. What company do you say? A. The Lee Collieries.

Q16. How many acres was there in the Lee Collieries, if you recall? A. Well, I don't recall that.

Q17. Was there any other cut off that you recall? A. Not that I know of. Yes, I think there were a couple of pieces cut off, one above the Lee Collieries, but I am not positive about that. 399

Q18. How long have you known this plant? A. Since 1908.

Q19. How long have you been operating in that field? A. About eighteen years.

Q20. During the time you have been operating there has this Boat Run Mine changed hands or changed ownership? A. Yes, sir, it has changed several times.

400 *Testimony of Herbert M. Crawford—Recalled—
Re-direct.*

Q21. Are you acquainted with the prices which it brought at different times when it was sold? A. As I remember, it was sold once for sixty thousand dollars, and another time it was just about that, I believe, at both times, or possibly a little more or little less.

401 Q22. What in your opinion is this mine, the coal, plant and equipment, owned by The Diamond Fuel Company, known as the Boat Run Mine, worth? I mean by that that in your judgment would it bring if it were offered for sale upon reasonable terms to a person who desired to purchase it? A. Well, I would say not over fifty thousand dollars, and possibly less now.

Q23. What is the character of coal produced at that mine? A. It is the same vein that I work in our mine. It is a seam coal about five and a half to six feet thick with a bone in the middle of seven or eight inches.

402 Q24. It is not of the high quality of coal as that known as the Pittsburgh coal? A. No. It is a seam coal practically, is what it is. That coal does not go to the Lakes and does not stand handling very well. It is essentially a seam coal.

Q25. The same kind of coal that you handle at your plant? A. Yes, sir.

Q26. What, in your opinion would that coal property, plant and equipment complete, as owned by the Diamond Fuel Company, have brought, if offered for sale on reasonable terms to a person desiring to have purchased it in the latter part of November, 1920? A. Well, it would probably have sold for considerably more then than it would now. There is no doubt of

Testimony of Herbert M. Crawford—Recalled— 403
Re-direct.

that; but when you get back of that period the price—well, there is not much relation between value and the price at which property was sold during 1920, the early part of 1920. In other words a property that could have been sold for a hundred and fifty thousand dollars then would do well to bring fifty thousand dollars now.

Q27. That is the latter part of 1920? A. Yes, sir. Possibly you would have got more for that field then than you would now. 404

Q28. About what would you think it would have realized then, upon the terms mentioned? A. Oh, well, I would not say over sixty thousand dollars.

Q29. Now what in your judgment would that plant have brought, if offered for sale and sold to a person who desired to purchase, upon reasonable terms, along about the latter part of February, 1921? A. Oh, fifty thousand dollars. possibly.

Q30. You think that would have been the highest figure they could have realized on it? 405
A. I would say so, yes.

W. I. BOOTH, a witness of lawful age called on behalf of the petitioning creditors being by me first duly sworn, deposes and says as follows:

Direct Examination by Mr. Law:

Q1. State your name, age and place of residence. A. W. I. Booth, 418 Main Street, Goff Plaza, Clarksburg, West Virginia; thirty-nine
407 years old; president of the Clarksburg Trust Company.

Q2. How far is it from your home at Clarksburg to New York, approximately? A. It is something over five hundred miles.

Q3. How long have you been engaged in the banking business? A. Since 1903.

Q4. Have you any other interests, or are you interested in any other way, say in the production and sale of coal? A. Yes, sir, I have various coal interests. I own considerable acreage that I am leasing on a royalty basis, and I am
408 interested in a number of operating companies.

Q5. Are you acquainted with the stratum and quality of the coal produced in and about Arden in Barbour County, West Virginia? A. Yes, sir.

Q6. Are you acquainted with the holdings of The Diamond Fuel Company there known as the Boat Run Mine? A. Yes, sir.

Q7. What coal is that produced from that plant, Mr Booth? A. What kind of coal, you mean?

Q8. Yes, as to being Pittsburgh or Kittaning or Freeport, or what? A. They call it Freeport. That is the same class of coal that underlies the farm on which I was raised. We always called it Freeport. I was raised in Barbour County.

Q9. You are acquainted with the holdings and plant of The Diamond Fuel Company? A. Yes, I first knew of this property when I was in the M. & M. Bank in Grafton in 1908. The M. & M. Bank was trustee, I believe, on a bond issue, and had some lease, probably, on this property, and I think the company which owned the property, failed, if I remember rightly, and it was finally purchased by the M. & M. Bank for forty-two thousand dollars. 410

Q10. When was that? A. Well, I was in the M. & M. Bank for something over a year. It was sold I think, between probably 1908 and 1912. We later, after I started the Clarksburg Trust Company—The M. & M. Bank put a bond issue on it, in which we were trustees in the bond issue, and then it was later sold to Alex. R. Watson, or the Initial Fuel Company, the same company in which he was interested, I believe, for seventy-five thousand dollars. The bond issue was liquidated about that time. I remember handling the bonds at the bank; and the next thing I heard of it the Initial Fuel Company had failed, or Alex. R. Watson, and the property was sold at bankrupt sale, and I understand the consideration was about sixty or sixty-five thousand dollars. 411

Q11. When was that? A. Oh, I could not give you that date.

412

Testimony of W. I. Booth—Direct.

Q12. Well, it has been the last few years? A. The last few years, yes, sir.

Q13. Now, Mr. Booth, in your opinion about what do those holdings consist of? A. These deeds of trust in which the M. & M. Bank was interested covered about twelve hundred acres, which they purchased for forty-two thousand dollars, as I said before. They sold to Mr. Watson, or the Initial Fuel Company, something like five hundred acres.

413

Q14. And that is the amount now owned by The Diamond Fuel Company? A. That is the amount they hold up there at this time.

Q15. I will ask you to state, Mr. Booth, what in your opinion that coal mine, plant and equipment complete, would have brought, say in November, the latter part of November, 1920, if offered for sale on reasonable terms to a person who desired to buy such property? A. Now do you want me to say what I would want to pay for it?

414

Q16. Not so much that as what you think it really could have been bought at, or what it could have been sold for at that time, if it had been offered for sale upon reasonable terms, and to a person who wanted to buy at a reasonable price, such property as that. A. Between fifty and sixty thousand dollars.

Q17. Now then upon the same terms, Mr. Booth, that is to say if it had been offered for sale to a person who desired to buy it, upon reasonable terms, what would that property have brought, in your opinion, say along in the middle of February, 1921? A. Well, the way coal conditions have been you probably would

not have been able to have gotten more than twenty-five or thirty thousand dollars; probably thirty-five thousand dollars out of it. In fact I was asked the question at one time, what I would give for the property, and I told the party who was talking to me that I would not want to give over thirty thousand dollars.

Q18. When was that? A. That was during 1921.

Q19. These prices now you fixed, are considering the sale free and quit from any liens and encumbrances? A. Yes, sir. 416

Cross Examination by Mr. Tibbetts:

Q1. It is your understanding that there is a mortgage on the Boat Run Mine at this time?

A. I have heard that there is, yes, sir.

Q2. Do you have any personal knowledge about it? A. I never saw the mortgage, or any of the bonds.

Q3. Do you know what the amount of the encumbrance is? A. I have heard that it is fifty thousand dollars. 417

It is stipulated and agreed by counsel that the signatures of witnesses to these depositions be, and the same are hereby waived.

Certificate of Notary.

State of West Virginia,
Harrison County, to wit:

I, the above named, O. L. Haught, do hereby certify that pursuant to the annexed notice issued and served in the above mentioned cause of the Diamond Fuel Company, a corporation, in bankruptcy, I was attended at the office number 518-520 Goff Building, Clarksburg, West Virginia, by J. E. Law of the firm of Law & McCue, attorneys-at-law of counsel for J. E. Law and A. F. McCue, partners, etc., and Morgantown Coal Company, a corporation, the intervening petitioning creditors, and also by Delbert M. Tibbetts, of the firm of Kirlin, Woolsey, Campbell, Hickox & Keating, counsel for Canute Steamship Company, Limited, and Campagne Navigazione Sota y Aznar, creditors, on the several days and dates hereinbefore stated; and the aforementioned witnesses, M. L. Taylor, Gordon B. Late, J. M. Stark, Charles P. Swint, Herbert M. Crawford, Harry C. Owen, E. S. Baumgartner, Anthony F. McCue, and W. I. Booth, who were of sound mind and lawful age, were by me first carefully examined, cautioned and duly sworn to testify the truth, the whole truth and nothing but the truth, and they thereupon testified as is above shown, and that the depositions were by me correctly and duly taken in shorthand notes or stenographic characters, and were by me written out in full and transcribed by me into the English language, and were taken at the place in the annexed notice specified and at the time set forth, adjournments being had or taken from day to day, as provided in said

Certificate of Notary.

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notice, and that the aforesaid counsel, the said J. E. Law and the said Delbert M. Tibbets, waived, by stipulation, as contained at the closing of the said depositions, the signing of said depositions by the said witnesses aforesaid.

I further certify that the reason for taking said depositions was and is, and the fact was and is that all of the deponents lived at points more than one hundred miles distant from the place where said suit is appointed by law to be tried; and that I am neither of counsel nor attorney to either or any of the parties to said suit, nor interested in the event of said cause; and that it being impracticable for me to deliver said depositions and the exhibits thereto attached, with my own hand into the court for which they were taken, I have retained the same for the purpose of being sealed up and directed with my own hand and speedily and safely transmitted by mail or by personal messenger to the said court for which they were taken, and to remain under my seal until then opened. As witness my hand and seal this 2nd day of January, 1922.

422

O. L. HAUGHT,
Notary Public, Harrison County,
West Virginia.

423

TAXATION OF COSTS:

O. L. Haught, Notary Public,

Taking depositions\$12.00

Transcript 268 folio 53.60

Postage 1.00

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Before:

Hon. A. N. HAND, J.

(No Jury)

425

 PITTSBURGH & WEST VIRGINIA
 COAL COMPANY, *et al.*

Petitioners,

vs.

 DIAMOND FUEL Co., a corpora-
 tion, alleged bankrupt,
 Respondent.

New York, January 16, 1922.

APPEARANCES:

426

 NASH ROCKWOOD, Atty. for Petitioning Credit-
 ors (Thomas F. Barrett, R. H. McNeill), of
 Counsel;

 STETSON, JENNINGS & RUSSELL, Attorneys for In-
 tervening Petitioning Creditors (Theodore
 Kiendl, Jr.), of Counsel;

 KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
 Attorneys for Intervening Objecting Credit-
 ors (Charles R. Hickox, D. M. Tibbetts), of
 Counsel;

 FRANK E. STRIPE, Attorney for Respondent (J. K.
 Ellenbogen, Otto Gillig), of Counsel.

It was stipulated and agreed by and among counsel that the case be tried without a jury.

The Court: A jury is waived in this case?

Mr. Rockwood: Yes. I move to amend the petition, *nunc pro tunc*, as of the date of the filing of the petition, to allege that the bankrupt has admitted its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground. 428

Mr. Hickox: And I oppose that motion, because such an application cannot be granted *nunc pro tunc*. It can be made now, and can be granted now, but it cannot be granted as of the date of the original petition.

The Court: It cannot be granted as of that date; I agree with you. I will deny the motion.

Mr. Rockwood: And I except.

Mr. Kiendl: We except to your Honor's denial of the motion. 429

Mr. Rockwood: Now, I move to amend the petition to allege, as a cumulative act of bankruptcy, that the corporation has admitted in writing its inability to pay its debts, and its willingness to be adjudged a bankrupt on that ground.

The Court: I will grant that motion. I understand that is not objected to?

Mr. Hickox: No.

Mr. Rockwood: I offer in evidence a stipulation by which the bankrupt withdraws its answer.

Mr. Gillig: I object to that on the ground that an attorney has no right to withdraw an answer of his own accord. He can only do so by corporate action, while this seeks to do it by a mere act of the attorney, which cannot be done. An attorney has no more right to withdraw an answer in a bankruptcy case than he has to deed over the bankrupt's property.

431 The Court: I think he has. I will receive it, and you take an exception?

Mr. Gillig: Yes, your Honor.

Mr. Hickox: I will read the stipulation (reading).

Mr. Gillig: I would like to have it noted that the signatures to this stipulation, which Mr. Hickox has just read, and which is dated December 27, 1921—that it is signed by Frank E. Stripe, attorney of record for the Diamond Fuel Company; Rockwood & Lark, attorneys for the petitioning creditors, and Stires & Barron, attorneys
432 for the receiver, so your Honor will understand that I am not proceeding on that stipulation. I am proceeding on an entirely different authority, which is the corporate action of the Board of Directors.

Mr. Rockwood: Now, I offer in evidence the original resolution of the Board of Directors, which Mr. Gillig has here, consenting to the adjudication.

Mr. Gillig: I think that, inasmuch as I am directed under this authorization to do certain

acts, it might be more fitting if I were to make the motion, as I intended to.

Mr. Rockwood: I beg your pardon, Mr. Gillig.

The Court: I will receive it. He is for the petitioning creditors. Do you wish to object to that?

Mr. Gillig: I do not, but I would like to formally move that this petition of the Diamond Fuel Company, dated December 29, 1921, and marked Exhibit No. 1, be offered in evidence, and pursuant to that exhibit, I move that the answer of the Diamond Fuel Company be withdrawn, and consent that the company be adjudged a bankrupt on the grounds stated in the petition of the petitioning creditors, to which this consent refers. I say that so that your Honor will not confuse this with an amendment that has been made, and as to which I cannot take any action. In other words, there has been an amendment to the original petition made by counsel, which I did not anticipate, and the only acts that I refer to are those contained in the original petition unamended. Does your Honor receive this in evidence.

434

The Court: I have received it in evidence on the offer of Judge Rockwood, and it has been marked. Now, read me what the last counsel said.

435

(The stenographer read to the court the statement of Mr. Gillig last above.)

The Court: It is in the record. Now, do you want to do anything more about it?

Mr. Gillig: If your Honor accepts this on Judge Rockwood's offer, then I simply want to complete the record by moving, as I am di-

rected to do in this resolution, that the answer of the Diamond Fuel Company be withdrawn, and in its behalf I consent that it be adjudged a bankrupt, because of the allegations contained in the original petition in bankruptcy.

The Court: What do you mean by the original petition?

Mr. Gillig: There was a petition filed, and I understand Judge Rockwood has now amended that.

437

The Court: I see.

Mr. Gillig: I have no authority to consent to anything as amended. I am holding myself strictly to the authority given to me by the directors, who did not anticipate any amendment.

The Court: Read me what has just been said. (Record read.)

The Court: Your motion is to simply add your consent as directed?

Mr. Gillig: Yes, sir.

The Court: That is all it is—to an adjudication?

438

Mr. Gillig: Yes, sir.

The Court: I grant that motion, and your consent is made a part of the record.

Mr. Gillig: And the answer is withdrawn?

The Court: And the answer is withdrawn.

Mr. Gillig: And so far as my client is concerned the company is subject to adjudication?

The Court: Yes.

Mr. Hickox: Now, if your Honor please, what Mr. Gillig has attempted to do is palpably beyond the terms of the resolution on which his authority is based, and I, therefore, object to anything being done—to his testimony, as not be-

ing proper proof on behalf of the bankrupt because the language of the resolution shows just what he is authorized to do, and he has attempted to go beyond that. He has attempted to say that he admits bankruptcy on the grounds alleged in the original petition, and there is not a word about that in the resolution.

The Court: Well, I will not hear argument about that. I will grant his motion and overrule your objection. I think, as attorney for the bankrupt, he can withdraw the answer. I am not saying what effect it has.

440

Mr. Gillig: The resolution refers to a petition for involuntary bankruptcy filed against this company on the 25th day of February, 1921. That was the original petition to which I referred, and that is the petition that is referred to in the resolution.

The Court: I understand that.

Mr. Ellenbogen: This consent of the attorney for the bankrupt, has that been marked in evidence?

441

The Court: I thought it was in evidence.

Mr. Ellenbogen: No, it has not been marked.

The Court: Judge Rockwood offered it. That had better be Exhibit No. 2. The other was Exhibit No. 1.

Mr. Gillig: Yes, my petition is Exhibit No. 1.

Mr. Rockwood: I offer in evidence depositions of witnesses taken on behalf of the petitioning creditors herein on the 29th day of December, 1921, pursuant to an order of the Court, and duly filed in the Clerk's Office of this Court.

Mr. Hickox: That includes the cross examination, I presume?

The Court: Oh, yes.

Mr. Rockwood: I offer the whole deposition. Shall I say "including the exhibits referred to therein"? Will that cover it. How many are there?

A Voice: Thirteen.

Mr. Rockwood: Yes, including thirteen exhibits referred to therein, and I will say to your Honor, as summarizing that testimony, that it shows the preferential transfer within the four months' period. Now, we will call Mr. Yerkes.

443 Mr. Hickox: Would it not be well for your Honor to get some idea of what is contained in these depositions?

The Court: It might be, yes. I do not know.

Mr. Hickox: I think it would be better for his Honor, as he goes along, to know what kind of a deal has been indulged in here. I have read these depositions through, and as I understand the story that these depositions tell, it is, first, that certain creditors claim that the Diamond Fuel Company owes them and must pay certain sums, the amount of their claims. Of course, those

444 creditors cannot say, and I think they do not attempt to say what the state of the finances of the Diamond Fuel Company may be. Then they also deal with the question of preferential transfer, which is alleged in the original petition, and, in substance, it seems to me that a number of persons creditors of the Diamond Fuel Company got together and arranged with the Diamond Fuel Company that they would find a purchaser for some coal lands owned by the Diamond Fuel Company. They did that, apparently; somebody was found to put up \$200,-

000, borrowed from a bank for the purpose, and ostensibly paid to the Diamond Fuel Company for some coal lands which were supposed to be worth at that time about \$100,000, but at the time that the witnesses testified they said they were not worth more than \$50,000.

This money was paid immediately and went through certain formal transfer from the Diamond Fuel Company to these creditors, and immediately back to the person who had borrowed it, who was merely a dummy, and then went back to the bank, and the lands were transferred from the Diamond Fuel Company to the various creditors, under that arrangement, and they were supposed to work up whatever value there might be in the lands; and they found, evidently, that they had made, as they say, a bad bargain, and they would like to rehash this transaction by transferring back to the Diamond Fuel Company these lands, if they could. Evidently, it was just a dummy transaction; there was nothing in the way of actual consideration furnished, in the way of money, because the \$200,000 did not belong to the creditors, but went right back to the bank, and they say that these lands which were transferred, being encumbered, are absolutely worthless, and always were worthless from the time they got them. That, I think, is the substance of the depositions.

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Mr. Rockwood: That is not our understanding at all, and I would ask your Honor to permit Mr. Barrett to explain the facts as he understands them. He is an attorney from West Virginia—to explain them to your Honor in full detail.

Mr. Barrett: If your Honor please the act of bankruptcy or preferential transfer complained of by the petitioning creditors in this case is that on a certain day—the averment in the petition is as follows (reading).

449 Now, what we complain of, your Honor, tersely stated, is exactly this; that the Diamond Fuel Company being a corporation organized under the laws of the State of Delaware, engaged in the business of mining and shipping coal from various mines in the State of West Virginia, in what we call the Northern District, being the judicial district of the United States Court, and also engaged commercially in shipping coal—buying coal from other operators, and selling it, and engaged generally in the business of exporting coal, with main offices here in the City of New York, at the time this preferential transfer was made, was in a condition of financial extremity, practically, being hard pressed by its creditors with obligations it was unable to meet, and acting under pressure of those creditors, the company made a
450 deal for all its mining properties in West Virginia, consisting of three or four different properties of some value over and above the encumbrances, but not, as it turned out, of very great value above the encumbrances.

That that transfer was made to one Charles S. Chestnut, of the City of Philadelphia, who, in turn, deeded the properties to what was known as the Barbour-Lewis Coal Company, incorporated under the laws of the State of West Virginia for the purpose of taking over the title to these properties for the benefit of these preferred creditors.

Now, that is the act of bankruptcy which we complaint of, and which we think comes clearly within the purview of the Act.

Now, following that act of bankruptcy, after it was discovered by these creditors who have petitioned here for this adjudication in bankruptcy, we discovered that an attachment, a short time prior to that, had been sued out in a proceeding in admiralty in the United States District Court for the State of Maryland, by the Canute Steamship Company, and that they had acquired a lien for a considerable amount of coal which was held to the credit of this defendant in the Tidewater Coal Exchange. That coal, I believe, was subsequently sold by consent of all parties. That attachment lien was sued out on the 28th day of October, and just one month subsequently, on the 28th day of November this preferential transfer, as we claim, was made. In February, within four months of the time that the attachment lien was secured, and of course within four months of the time of the preferential deed, the petition in bankruptcy was filed in this jurisdiction and, therefore, we claim to be well within the four months' limit. 452 453

The Court: This petition was filed last November?

Mr. Barrett: It was filed in February, your Honor.

The Court: It is an old matter, then.

Mr. Barrett: Yes, your Honor, it is an old matter, and that was the reason why we were in some doubt regarding the amendment of the petition at this time. We felt satisfied to stand

upon the original preferential averments, but in order that the Court may get it in mind—

The Court (Interposing): What is the date of this resolution here?

Mr. Barrett: That is just what I was coming to.

The Court: All right.

Mr. Barrett: These transactions, taken *seriatim*, are about as follows: On the 28th day of October, this attachment in Baltimore was secured.

455

The Court: 1920?

Mr. Barrett: Yes. 1920. Now, on the 28th day of November following—the 28th or 29th—the preferential deed was given, and was recorded in the proper books of record of West Virginia. A defense to the attachment proceedings was interposed in Baltimore by the Diamond Fuel Company, and a trial was had there, and Judge Rose, after some consideration of the matter decided that this steamship company was entitled to recover, and referred the matter to a commissioner of the court to assess the damages to which they would be entitled, and the final decree or report of the commissioner has been made, and I think you will find the decree has been entered.

456

The Court: For how much is that decree?

Mr. Barrett: It is about \$160,000. Now, the intention is to take an appeal in that case, and have it reviewed by the Court above.

Mr. Hickox: I understand there is no intention to take an appeal.

Mr. Barrett: I am here to tell the Court that there is, and that is one thing that we want to

have impressed on the minds of these gentlemen. The intention is to take an appeal, your Honor. That is, however, a matter that is now on its way in another jurisdiction.

The Court: Now, I understand that they transferred this land to whom?

Mr. Barrett: They transferred the coal mining properties and land, which consisted of all mining machinery and equipped mines—they transferred it first, to one Charles Chestnut, of the City of Philadelphia, and it appears from the statements that have been made by those who were present at the time, that a certain amount of money was brought from a bank in Philadelphia up to a law office where this transfer took place, and it was paid over there, under some sort of arrangement, to some one else, who immediately paid it back to the bank officer, who waited there for it, and took it away with him, and this man Chestnut, immediately after that, made a deed to the Barbour-Lewis Coal Company. 458

The Court: What is the Barbour-Lewis Coal Company? 459

Mr. Barrett: The Barbour-Lewis Coal Company was a company formed for the purpose of taking over this title. It was evidently in contemplation before that.

The Court: And their stock went to—

Mr. Barrett: (Interposing): To these preferred creditors. They first transferred their property to an individual, and that individual immediately transferred it to the Barbour-Lewis Coal Company, and that company made a distri-

bution of the stock or beneficial certificates to the various preferred creditors who—

The Court (Interposing): What did the company that transferred the coal lands get in return?

461 Mr. Barrett: They did not get anything, I suppose, except a credit for part of their debts to these preferred creditors. I understand the status of those claims now is that the preferred creditors, if the transaction had gone through and had not been interrupted by this bankruptcy proceeding—that they would have owned the property, and received a certain amount from the company to pay the balance which the property did not cover.

The Court: You claim that there was no contemplation directly or indirectly, either that that stock or that money or any of the proceeds of the money or of the coal lands transferred would be for the benefit of general creditors?

Mr. Barrett: That was the cause of the filing of the petition in bankruptcy.

462 Mr. Hickox: I was merely attempting to state to your Honor what these depositions contain. Mr. Barrett, however, has been giving you some of the history of the case—his contentions. I have taken no deposition with respect to this transaction at all. We never have had to yet. I shall take it in due course, however.

Mr. Barrett: My object in making the statement which I have, in the form which I have presented it to the Court, was to inform the Court as to what these various transactions were. After we got along to the point of filing

this petition in bankruptcy, the company interposed an answer.

It has been nearly a year since the petition in bankruptcy was filed, and a receiver was appointed, Mr. John B. Johnson, a member of the bar of this city, and he immediately took charge of the affairs of the alleged bankrupt.

The Court: What proof has been made of the extent of the liabilities?

Mr. Barrett: There are in these depositions items of proof that will be offered on the trial here. 464

The Court: Those depositions are limited practically to the acts of bankruptcy?

Mr. Barrett: But we are prepared to show by oral testimony in court here additional evidence of insolvency. I was proceeding in this case, myself, on the theory that when the company had once withdrawn its answer, that was tantamount to an admission of all the allegations contained in the petition, and that it shifted the burden of proof to the intervening creditors here; but I would like to complete my statement as to these various transactions. 465

After the petition in bankruptcy was filed, as I said, the company interposed an answer, and it took no steps at all to rescue its property from the receiver or to re-establish its business. In fact, no move was made at all. The officers were scattered, and the officers gone, and the records in the hands of a receiver in this jurisdiction—and an ancillary receiver in West Virginia, who was appointed by the Court there after this proceeding took place

Now, a short time ago, by permission of the Court, the Canute Steamship Company, I think that is the name of the concern, represented by these gentlemen, intervened and got permission of the Court to file an answer in this case. The Canute Steamship Company, as I understand it, having an unliquidated claim for damages, based upon a breach of contract, which they have sued upon in Baltimore—

467 Mr. Hickox (Interposing): Liquidated by final decree now.

Mr. Barrett: Not final until it has been disposed of on appeal.

The Court: Well, it is in equity, and there is no appeal pending?

Mr. Hickox No appeal pending, your Honor.

The Court: Then of course it is liquidated. What effect it would have if it were appealed, I do not know, but it is final now.

468 Mr. Barrett: When the appeal is perfected we assume it will remain unliquidated until disposed of by a higher court. As I understand, the intervening creditor has a right, under law and the practice, and has really accruing to his benefit all of the defenses which might have been made by the original answer of the defendant company itself; but it seems to me that the company having withdrawn its answer, that this intervening creditor should be limited as to the testimony he produces to establishing the fact that if this corporation is allowed to go on, and this adjudication does not take place, and to transact the business that it was engaged in

when this receiver was appointed, that it would be able to rescue its property from the receivership, and re-establish itself as a solvent concern, with the aid of these creditors or other creditors, who seek to get it out, and thereby re-establish itself in business in such a way as to be able to handle its assets and to handle its affairs better than could be done by a trustee. It seems to me that the only defense that they can make, now that the company itself has withdrawn its answer, would be along those lines.

470

The Court: I thought we were all through with that. That was argued before. I think that answer is just like any other answer.

Mr. Barrett: Well, your Honor, I have a case here in the 17th American Bankruptcy Reporter. I do not know whether I have a reference to that or not, but I could bring your Honor the volume itself, if you would like to see it.

The Court: Does that deal particularly with an attaching creditor?

Mr. Barrett: It would be this case almost exactly in every respect. It is a case of a corporation whose assets had been attached—

471

The Court (Interposing): Have you not a memorandum of that case?

Mr. Barrett: I think I can locate it, your Honor. I will send for the authority.

The Court: You had better go on and put in your proof, I think. I do not see that the fact that these were attaching creditors makes any difference at all. They have got a final decree, and the final decree is binding on me. If it were appealed from, perhaps on the

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theory that there is a new trial in the Circuit Court of Appeals, it might not be appropriate; I do not know whether it would or not, but it is now.

Mr. Barrett: I will get that authority.

The Court: Of course, if the bankruptcy proceeding goes through, it will dissolve the attachment.

Mr. Barrett: Yes.

The Court: Just put on your witnesses here, if you have any.

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Mr. Rockwood: As a preliminary act, may the depositions be marked in evidence with the exhibits?

The Clerk: They are all marked as Exhibit No. 3.

Mr. Rockwood: Does your Honor desire to have them all read? I do not suppose you do.

The Court: No.

Mr. Rockwood: Mr. Yerkes.

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GARDNER YERKES, called as a witness on behalf of the Petitioning Creditors, having been duly sworn, testified as follows:

Direct Examination by Mr. Rockwood:

Q. Mr. Yerkes, where do you live? A. In New York City.

Q. What was your connection with the Diamond Fuel Company? A. Secretary.

Q. When did you become Secretary? A. And Treasurer— when the company was formed.

Q. What was the date? A. The company was organized, I think, the last of May, 1919.

Q. Was it a New York corporation or a Delaware corporation? A. A Delaware corporation.

Q. Who was the president of the company? A. Henry P. Bope.

Q. And you were secretary and treasurer? A. Yes.

Q. Did you have the books of the company as such officer? A. At the New York office.

Q. Were you familiar with its affairs? A. Yes.

Q. What was the general business of the Diamond Fuel Company? A. Mining coal—buying and selling coal.

Q. That is, it was in the wholesale coal business? A. Yes, sir.

Q. The mining and selling of coal? A. Yes.

Q. At wholesale? A. Yes.

Q. In West Virginia? A. Yes.

Q. And what did its properties consist of, in a general way? A. Well, they consisted of a fully equipped mine at Arden, West Virginia, and then a couple of other leased properties—small properties.

Q. Did it have any personal property? A. Oh, it had if you call that personal property—equipment and mules and things that are used around a mine.

Q. Now, in this case the petition in bankruptcy was filed on the 28th day of February, 1921; is that your recollection? A. Yes, sir.

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Mr. Kiendl: The 25th.

Mr. Rockwood: Yes, February 25, 1921.

The Witness: No, 1920.

By Mr. Rockwood:

Q. 1920? A. Yes.

Q. Is that your recollection? A. Yes.

Mr. Rockwood: I think it was 1921, at that.

Mr. Kiendl: Yes, 1921.

479 The Witness: What date?

Q. 1921, was it not—February 25, 1921? A. Oh, yes, that is correct.

Q. At that time did the Diamond Fuel Company have an office in the City of New York? A. Yes.

Q. And previous to that time had it maintained an office here? A. It had maintained an office here from about August 1, 1919.

Q. Where was the office? A. The last office was on 43rd Street, 25 West.

480 Q. And is that where you were located? A. Yes.

Q. And were the books and records of the company kept there? A. The New York records were all kept there.

Q. You had charge of them? A. Yes.

Q. Where was the bank account kept? A. They had two bank accounts, a bank in New York and one in West Virginia.

Q. In what bank was the bank account in New York? A. At the Chelsea.

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Q. The Chelsea Exchange Bank? A. Yes.

Q. Now, will you state to his Honor, in a general way, just what properties this company owned previous to any transfer—coal properties—or have you already done that when you said a fully equipped mine at Arden, West Virginia? A. Well, it had a couple of mines leased, and another mine that the company had undertaken to purchase, and had made a part payment on.

Q. But its principal mine was at Arden, was it? A. Yes. 482

Q. Just take that property; was there a deed made of that property by the Diamond Fuel Company to any one? A. Yes, sir.

Q. When was that deed executed? A. I will have to refresh my memory. I cannot say positively.

Q. Well, tell me who it was deeded to, and then I have got the deed here? A. To a man by the name of Chestnut.

Q. To a man named Chestnut? A. I will not state positively, but I think it was made to Chestnut. 483

Q. On the 27th day of November, 1920, did the Diamond Fuel Company by deed convey to Charles S. Chestnut of Philadelphia the property known as Stone Mine in West Virginia? A. Yes, sir.

Q. And I show you the deed, and I ask you if that is the original deed by which that transfer was made (handing paper to witness), that being Exhibit No. 3 attached to the deposition? A. Yes, that is the deed.

Q. That is the deed? A. Yes

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Q. And was this the principal mine of the company? A. No, the mine at Arden was the principal property.

Q. Was this the leased property? A. No, that property, there was one payment made on it.

Q. One payment had been made upon it? A. Yes.

Q. And did this deed include the Arden mine? A. Yes.

485 Q. Just what properties were conveyed by that deed? A. My understanding is the Boat Run mine—

Mr. Kiendl: That is not so, Judge. The other deed was the Boat Run mine.

The Witness: This conveyed the Stone mine.

Q. And that was a leasehold interest? A. No, there was a first payment made on that mine.

Q. A first payment had been made on that? A. Yes.

486 Q. This was one of the properties of the Diamond Fuel Company? A. Yes.

Q. Was this an operating property at the time it was transferred? A. Yes.

Q. What was the extent of the encumbrance upon this property at the time of its transfer? A. About eight—

Q. (Interposing) Was it \$55,000?

Mr. Hickox: I object, your Honor. They have this witness testify to certain things that are not satisfactory to them, and

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then they have a confab with him, and then they ask him something else.

Mr. Rockwood: I object to that statement. I had no confab with the witness at all.

The Court: What is the objection?

Mr. Hickox: He is asking what consideration was given for this mine.

Mr. Rockwood: No, I did not ask him that. I said, what was the encumbrance upon it.

488

Mr. Hickox: Now, he is suggesting the answer himself.

Q. What was the encumbrance upon the property at the time of the transfer? A. There was a dispute about the encumbrance on that property. We sent \$50,000 down to West Virginia to be paid as the first payment. It developed that there was only \$25,000 paid. Now, if there was only \$25,000 paid, there was a balance due of \$80,000.

Q. A mortgage, is that? A. Yes. If there was \$50,000 paid, there would be \$55,000 left.

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Q. What was the consideration for the transfer? A. When?

Q. At the time? A. For this transfer?

Q. Yes. A. It was all included in the total amount—the lump amount for all the property.

Q. What was that total amount? A. \$200,000.

Q. That is, the company deeded to Mr. Chestnut all of its properties for \$200,000? A. Yes.

Q. And this was one of the deeds in that transaction? A. Yes.

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The Court: You are treasurer of the company, or were at the time?

The Witness: Yes, sir.

The Court: Well, what did they get to represent that \$200,000, and to whom was it paid, if you know?

The Witness: The money was paid over, and we were given credit by certain creditors—coal creditors.

Q. What his Honor wants to know is—

491

The Court (Interposing): I do not understand that answer.

The Witness: We were paid \$200,000. We paid that money over, and we were given credit by the Seaboard Coal & Coke Company. They were heavy creditors—all those people—by the Gordon B. Late Coal Company, by the Fisher Summit Coal Company, the Westwood Coal Exchange, and H. J. Berry.

Q. Let me see if I understand the transaction:

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The Diamond Fuel Company was indebted to the Seaboard Company, and the various ones that you have mentioned, in certain sums of money, was it? A. Yes.

Q. And it disposed of all its assets by deed to Chestnut for a consideration of \$200,000; is that correct? A. Yes.

Q. And Chestnut turned back to you receipts from the various creditors that the Diamond Fuel Company owed, to the amount of \$200,000; is that correct? A. Correct.

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Q. Is that correct? A. Yes.

Q. So that when the transaction was ended, the Diamond Fuel Company had divested itself of its coal properties, and had paid the creditors whose names you have mentioned, \$200,000?

A. Yes.

Q. That was the transaction? A. Yes.

Q. And at that time were there a large number of other creditors left unpaid, including the petitioning creditors herein and the intervening creditors represented by Mr. Kiendl? A. Yes, there were a number. 494

Q. Well, is my question correct, that the petitioning creditors herein and the intervening creditors were left unpaid?

Mr. Hickox: I suggest that they be specified.

The Court: Yes, they ought to be specified.

Q. Specify, then, what creditors were left unpaid after the completion of this transaction with Chestnut? 495

Mr. Barrett: We will have to file a list of those. We haven't got them.

The Court: Just state the creditors and the amounts of their claims.

The Witness: Well, the steamship Dunston Hall claimed \$34,000; Stephenson & Co., \$20,000; the steamship Kohan Maru, \$125,000; now, those were claims that were put in at that time.

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The Court: Are those the petitioning creditors—those people that he has named?

Mr. Rockwood: No, sir, he has not named them.

Q. Go on and name them.

Mr. Hickox: These are unliquidated claims.

The Court: That you do not admit?

497

The Witness: We did not admit. Those are included in what the Court decided against the company, are they not?

Mr. Hickox: No.

The Witness: Then there were three steamers, the Unbemende, the Severnmede, and the Nicholas.

Q. At the time of this transfer to Chestnut was the Pittsburgh & West Virginia Coal Company a creditor of the Diamond Fuel Company? A. Not according to the records in the New York office.

498

Q. Have you the records of the West Virginia office? A. I have not the records of the West Virginia office.

Q. Was H. M. Crawford Coal Company a creditor? A. Yes.

Q. In what amount? A. \$1,653.

Q. Were they paid by this transaction with Chestnut? A. No, sir.

Q. They were left unpaid? A. Yes.

Q. Was the Boulder Coal Company a creditor? A. Yes.

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Q. To what amount? A. \$2,420.

Q. Were they paid by the transaction with Chestnut? A. No.

Q. Was the Morgantown Coal Company a creditor at that time? A. Yes.

Q. Were they paid in the transaction with Chestnut? A. No.

Q. What was the amount of their claim? A. \$2,113.24.

The Court: Was that amount due and owing?

500

The Witness: Yes, sir.

Q. And were the various amounts which you have just given, in answer to my questions, due and owing to the creditors named, at the time? A. Yes.

Q. Was there an obligation to the Aetna Explosives Company? A. Yes, sir.

Q. How much was it? A. \$1,680.

Q. And was that due and owing? A. Yes, sir.

Q. Now, will you give me, without my refreshing your memory, the names of other liquidated debts due to creditors of the Diamond Fuel Company at the time of the transfer to Chestnut, stating the amounts of each that were not paid? A. There is a whole long list I have.

501

Q. Well, instead of saying that, will you just read them off quickly, with the amounts? A. Well, the National Building Association, \$1,420; Frank E. Stripe, \$1000; Colonel Bope, \$12,000, plus; Cochran, Fitzgerald & Co., \$6.12; Western Union Telegraph Company, \$3.09; New York

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Telephone Company \$28.; and a clerk in the office, \$58; Nicholas, Oakley & Lilley, \$162.00; advertising, \$585; Coal Trade Journal, \$75; Seward's Journal, \$87; American Coal Trade Journal, \$85; Simpson, Spencer & Young, \$61.10; Baltimore & Ohio Railroad, \$1,837. Those are the principal ones.

Q. Now, were the amounts you have stated in that list all due and owing to those various creditors at that time? A. Yes, sir.

503 Q. Was any provision made for their payment? A. Well, at that time we thought we could.

Q. But at the time of the transfer was any provision made for the payment of those debts? A. No.

Q. Was there an indebtedness to a concern named Fosburg? A. That was simply a claim.

Q. How much was it? A. \$120.

Q. Was any provision made for the payment of that? A. No, sir.

504 Q. Was there an indebtedness to the Black Diamond Publishing Company? A. Yes, that is what I said—for advertising, Black Diamond, \$585.

Q. Was that due? A. Yes.

Q. That was for coal, was it? A. For advertising.

Q. For advertising? A. Yes.

Q. Was there an obligation to Coale & Co.? A. No, not direct, as I recall.

Q. To the National Surety Company was there a debt? A. Not as such on the books of the company.

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Q. Not on your books? A. No.

Q. Now, did this transfer to Mr. Chestnut divest the company of its assets? A. Yes.

Q. And after this transfer had become effective by vesting title in Chestnut, did the Diamond Fuel Company have possession of sufficient assets to liquidate or pay its debts? A. It thought it did have at that time.

Q. Whether it thought so or not, did it, as a matter of fact? A. No.

Q. It did not? A. No.

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Q. Was it, therefore, the effect of this transaction that the company divested itself of its assets, and paid the claims of certain preferred creditors?

Mr. Tibbets: I object to that as a conclusion, if your Honor please. The witness has stated the fact.

The Court: I will sustain the objection.

Q. When was the attachment of the Canute Steamship Company levied, if you know the date?

A. I cannot recall the exact date.

507

Mr. Rockwood: May it be consented that it was the 28th of October, 1919, or rather, 1920, subject to verification? Counsel admit that the attachment of the steamship companies was levied upon the fund in Baltimore on the 28th day of October, 1920.

Mr. Hickox: But I object to the materiality of the matter, as it is not alleged

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in any of the petitions at all, or in any of the amendments.

The Court: Well, I do not know how it may be connected. I will overrule the objection. Now, may I ask this: Has Mr. Hickox's client's claim been mentioned by this witness yet.

Mr. Rockwood: No, sir.

Q. Will you now refer to the claims of the Canute Steamship Company, and describe them to the Court?

The Court: Is that the claim of Mr. Hickox's clients?

Mr. Rockwood: Yes.

The Witness: Unless it is under the name of the steamers, it is not in this list.

Q. Am I correct in saying that the claims of the steamship companies were for damages for failure to deliver coal or breach of contract, rather—breach of contract on a charter party? A. Yes, sir.

510 Q. That is what they were? A. Yes.

Q. And those claims were not for goods sold and delivered? A. Oh, no.

Q. Nor for money paid? A. No.

Q. The steamship companies had a charter party to carry coal for the Diamond Fuel Company; is that correct? A. Yes.

Q. And certain coal was shipped to Baltimore by your company? A. Yes, sir.

Q. And went into what exchange? A. The Coal Exchange.

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Q. The Tidewater Coal Exchange? A. Yes, the Tidewater Coal Exchange, Incorporated.

Q. And was that coal which was there at Baltimore attached by the steamship companies under what was claimed to be a breach of contract of the charter party? A. I don't know what they attributed it to. They attached it.

Q. They attached it? A. Yes.

Q. And sold it? A. We understand it was converted into money, and the money held.

Q. And they realized how much? A. I don't know the exact amount. Something over \$100,000. 512

Q. About \$160,000, was it not? A. No, it was not as much as that.

Q. The judgment was for \$160,000, was it not? A. About that..

Q. And the amount of money realized from the sale of the coal was about \$110,000, was it not? A. About that.

Q. \$108,000, I should say. Now, on the 28th day of—

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The Court (interposing): That whole matter has been litigated before Judge Rose, and a decree entered for the whole amount in personam.

Mr. Rockwood: Yes, that is right.

The Court: It is covered by an attachment.

Mr. Hickox: Whatever the amount was, whether it is \$108,000 or something else—

The Court (interposing): Is the attached property short of the amount of the judgment?

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Mr. Hickox: Oh, yes, about \$50,000.

Mr. Rockwood: Yes, it is about \$50,000 short.

The Court: Well, however, good or bad the decree may be, it is perfectly appropriate here as far as I can see and it cannot be questioned. I do not see where it has been questioned.

Mr. Rockwood: You mean as a debt?

The Court: Yes.

515

Mr. Rockwood: The only question is whether it is within the four months' period.

The Court: Well, that is another question.

Mr. Rockwood: But the bona fides of the debt stand here until it is determined on appeal.

Q. What assets did the Diamond Fuel Company have on the 25th day of October, 1920, by which its debts could have been paid?

516

The Court: That is the date of what? The attachment?

Mr. Rockwood: Yes, your Honor.

Mr. Hickox: That has nothing to do with any allegation in the petition. The original petition was filed some time in the following November—the following February, rather.

The Court: Yes, I do not see how that affects the petition.

Mr. Rockwood: As showing that they were insolvent at the time of the levy

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of the attachment and before the four months period.

The Court: You have not alleged any act of bankruptcy connected with judgments or attachments or anything of that kind, have you?

Mr. Hickox: No.

The Court: Objection sustained.

Q. Can you state the assets of the company and its liabilities as of February 25 1921.

518

The Court: Is that the date the petition was filed?

Mr. Rockwood: Yes.

The Court: Well, it is after one o'clock. I think we had better adjourn for lunch. You get all ready to answer that by two o'clock, or two-fifteen.

Recess.

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Afternoon Session.

GARDNER YERKES, resumed the stand.

Mr. Barrett: If your Honor please, this morning I called your attention to some authorities.

Mr. Hickox: Is your Honor going to hear argument now or conclude with the testimony?

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The Court: I think we had better conclude with the proof. You haven't found anything definite, have you, that holds that that a creditor's answer is different from any other answer?

521

Mr. Barrett: Just as I told your Honor this morning, I hold it is material. After the answer of the Diamond Fuel Company has been withdrawn, in my mind there is a very serious question whether the right to proceed exists.

The Court: There is a serious question, but you had better proceed I think.

Direct Examination (continued) by Mr. Rockwood:

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Q. Mr. Yerkes, when we adjourned this noon I asked you if you could give the assets and liabilities of the Diamond Fuel Company on the 25th day of February, 1921. (Can you give that statement? A. I cannot give it all. We had no physical assets. The liabilities, or that is the claims, amounted to over a million.

Q. What was the amount of the liquidated claims or admitted claims? A. The total amount of the claims that were put in here, as I have just said, amounted to over a million. The smaller amount—

Q. (Interrupting) Before you get to that, of the total claims of a million dollars what proportion or what amount was liquidated and admitted? A. Over \$200,000.

Q. Over \$200,000? A. Yes.

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Q. And did the company have any assets with which to pay these claims? A. Not enough to pay the claims, because we did not consider that they were just claims—all of them.

Q. How many did you consider as just claims?

The Court: You stated that they were liquidated and admitted?

The Witness: As to \$200,000.

The Court: Yes.

The Witness: But this is over a million.

524

Q. You have said you had \$200,000 admitted claims? A. Yes.

Q. What cash or properties did you have with which to pay off those \$200,000 of creditors? A. The mining properties that we turned over, the deeds for which we spoke of this morning.

Q. Those were gone? A. Yes, then there was not anything left as physical assets.

The Court: So you had \$200,000 of admitted claims with nothing to pay them with? Or did the \$200,000 include the claims that you mentioned this morning upon which payment had been made?

525

The Witness: The claims of the coal companies amounted to over \$200,000, but they made a settlement and allowed credit for \$200,000. There was still a balance due them according to the figures.

Q. Of how much? A. It amounted to over \$300,000, the total amount.

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Q. Then on February 25, when this petition was filed, of 1921, did the company have assets with which to pay its admitted debts? A. No, sir.

527

The Court: Did those admitted debts then, after making the credits which you have mentioned, that were made at the time of this coal land transaction—did the balance, the admitted balance amount to \$300,000 due to creditors?

The Witness: Yes, the amount claimed by the coal creditors was over approximately \$350,000 at that time, and we paid \$200,00 of it. Then there was on account—

Mr. Rockwood (interrupting): His Honor asked you a question.

The Court: See if you can straighten it out.

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Q. What we want to get at is, the amount you owed on February 25, 1921. There was a petition in bankruptcy filed here, you remember. At that time you had a certain amount of admitted debts, did you not? A. Yes.

Q. Entirely aside from the debts which were liquidated and paid in that transaction by which you deeded them your property, how much other admitted debts were there in amount? A. From my personal point of view I consider there was over half a million dollars.

Q. Aside from your personal point of view, what amount was there concededly admitted by everybody connected with the company if you

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know? A. Mr. Rockwood, others in the company considered that the steamship companies did not have a valid claim. That is where the dispute between them and me arose. I considered that the steamship companies were entitled to their claim.

Q. What was the amount of admitted claims outside the steamship companies claims and outside of the claims paid for in the Chestnut transaction? A. That is a question I could not answer. It was more than the company had to pay them. 530

Q. About how much was it? A. It must have amounted—outside of the steamship companies claims, it must have amounted to over \$100,000.

Q. Was there any property or assets with which to pay that \$100,000? A. No, sir.

Q. When this petition was filed? A. No, sir.

Q. And the \$100,000 were admitted claims and included all claims of which I asked you this morning? A. Yes.

Q. When you say the company had no assets there was money in the hands of the court in Baltimore, not subject to this attachment, was there not? A. Yes, sir. 531

The Court: Let me ask you if that claim, that is the attaching creditors' claim is one of these steamship companies' claims that you refer to which you thought was good and other people did not think was good.

The Witness: Yes.

The Court: It is good now of course for the purpose of this trial.

532

Testimony of Gardner Yerkes—Direct.

Mr. Rockwood: Yes.

Q. There was a certain fund there, or a certain amount of coal there which subsequently brought \$110,000 on a sale, is that correct? A. Yes, that is absolutely correct.

533

Q. And when you say that the company owed \$100,000, have you included—I want to be very sure about it—the steamship companies as creditors and also the parties who were paid off in the Chestnut deed transaction? A. No. I will make it clear to you—

Q. No, answer my questions and I think it will be made clear. You had a certain transaction with Chestnut in which \$200,000 was paid and \$200,000 of debts were liquidated or paid, and then you had a transaction with the steamship companies in which they claimed approximately \$166,000 for attached coal which subsequently sold for \$110,000 is that right? A. Yes.

534

Q. Entirely aside from those two transactions, you had other creditors amounting to how much? A. Over and above the amount down in Baltimore there was as I said before \$100,000.

Q. And nothing to pay it with? A. No.

Q. Aside from the money which was attached in Baltimore, or aside from the coal attached in Baltimore, which brought \$110,000, and aside from the lands which were sold to Chestnut on the basis of \$200,000, did the company have any other physical assets or property aside from office furniture and small pieces of personal property? A. They had some bills receivable.

Q. What amount of bills receivable? A. About \$20,000.

Q. Does that state the entire property? A. That was reduced. That was the Brooklyn-Edison Company, and it was reduced to about \$5,000 in round numbers.

Q. So if I should say that the sale to Chestnut took away the real estate and that the attachment in Baltimore took away the \$110,000, then I have left at the time this petition was filed Feb. 25, 1921, not to exceed \$20,000 of property represented by bills receivable and some articles of furniture—is that right? A. They did not have that much, because the bill of the Brooklyn-Edison Company was reduced according to our books.

536

Q. You say that that claim was subsequently reduced to about \$5,000? A. Yes.

Q. And entirely aside from the steamship companies and the Chestnut deal there was at least \$100,000 of admitted debts outstanding at the time this petition was filed? A. Practically, yes, sir.

537

Q. And there were, in addition to those items, in addition to the admitted claims, there was a large number of claims which were disputed? A. Yes, sir.

Q. For instance, there was the claim of Fosburg & Mark, which I understand your company disputed, is that correct? A. Yes.

Q. And that claim amounted to or consisted of the advancement by Fosburg & Mark of cash to the Diamond Fuel Company, as an advance on coal ordered of \$120,000 in money, did it not? A. Yes, sir, practically that.

538

Testimony of Gardner Yerkes—Direct.

Q. And notwithstanding the fact that your company received that 120,000 in money, it disputed that claim by a verified answer, did it not?
A. Yes.

Q. When Fosburg & Mark brought the suit?
A. Yes.

Q. Or rather you demurred to the claim? A. Yes.

Q. It is now an admitted claim as you understand it? A. I don't know whether you would call it an admitted claim or not.

539

Q. It is a just claim? A. They have a just claim.

Q. And it was a just claim when this petition was filed? A. Yes.

Q. Fosburg & Mark gave them in cash \$120,000, didn't they? A. Yes.

Q. And got nothing for it? A. Yes, sir.

Q. And that claim existed when this petition was filed? A. Yes.

Q. If that was a valid claim then the debts amounted to at least \$220,000, didn't they, at that time? A. Yes.

540

Q. With no assets with which to pay? A. No.

The Court: Do I understand you are disputing that claim?

The Witness: No.

Mr. Rockwood: They demurred to the complaint. I cannot understand on what possible theory. They got an advancement of \$120,000 in money. I think that is all with this witness.

Mr. Kiendl: May I ask the witness one or two questions?

The Court: Yes.

Testimony of Gardner Yerkes—Cross.

541

Cross Examination by Mr. Kiendl:

Q. Included in this list of claims you have enumerated as existed on Feb. 25, 1921, the date when the petition was filed, you did not include the law firm of Law & McCue, did you? A. No.

Q. Didn't they have a claim for professional services rendered which was admittedly due of \$83,000? A. Yes.

Q. Mr. Yerkes, the transfer of these mining properties to Mr. Chestnut on or about Nov. 28, 1920, was only in part payment of these five claims you have enumerated? A. Yes, sir.

542

Q. It was not in full liquidation of these claims? A. Not as I understand it, no.

Q. These debts which you say were admittedly due at the time of the filing of the petition which you have read in evidence here—can you tell us whether or not subsequently all of those debts matured before Oct. 28, 1920, when this attachment was filed.

Mr. Hickox: That is objected to.

Mr. Kiendl: I will withdraw the question.

543

Cross Examination by Mr. Hickox:

Q. Prior to the transfer of this property in Philadelphia did you have some conferences with various parties concerned? A. You mean with the creditors?

544

Testimony of Gardner Yerkes—Cross.

Q. I mean just what I say. You know who the various parties concerned in the transfer were, don't you? A. Yes, sir.

Q. Did you have some conferences with them previous to the transfer? A. Yes, sir.

Q. Did you have more than one conference? A. Yes.

Q. Where? A. In the company's office.

Q. Here in New York? A. Yes, sir.

Q. What was the substance of the conferences?

545

Mr. Rockwood: I object to that as hearsay.

The Court: Who was there?

Q. Conferences with the parties concerned in the transfer of this property in November.

Mr. Rockwood: I object to that as hearsay. If the vendee had said, "I won't insist upon the transfer," if it was in fact a legal divestment of title as to us, that would be all that would be necessary.

546

Mr. Hickox: This is cross examination on matter brought out by the petitioning creditors.

The Court: I will allow it.

Mr. Rockwood: Exception.

Q. What was the purport of the conferences?
A. Why, it was impossible to pay in cash the amount claimed for coal, and then in our own company there was a dispute as to the validity of those claims anyway, and the discussions

were to bring out whether they were sound or not, and then it was decided that the company would turn the property over to them then so they would be secured, and then fight out the validity of their claims.

Q. How were you going to fight out the validity of the claims? A. That was a difference of opinion again.

Q. What was your discussion about it? A. Well, the discussion was whether the company really bought the coal or not, or whether an individual bought it.

548

Q. That is whether the Diamond Fuel Company really bought the coal? A. Yes.

Q. What was the discussion about in fighting out the claim? A. They wanted to go along and then determine whether the company really did buy the coal or not. It was mostly lawyers doing the talking.

Q. After you had some talk, just what scheme was evolved, what was the plan? A. These coal creditors had to be secured and property was turned over and deeded to them to secure them.

549

Q. Well, perhaps I can draw it out from you by a number of questions. A. If they were protected, then we could find out something that was tangible to work out a solution, but everybody stopped. They found—let me make one point clear—it developed that so much was being done by the Diamond Fuel Company, that the New York office, the treasurer in particular, knew nothing about—that kept coming up every day, and it was a hopeless case.

Q. At the time that you partook of these con-

550

Testimony of Gardner Yerkes—Cross.

ferences you did not consider it was a hopeless case, did you? A. At first we did not, no.

Q. And you hoped and expected that when this plan was carried through the Diamond Fuel Company would be able to keep its head above water?

Mr. Rockwood: Objected to as immaterial and calling for the opinion of the witness.

The Court: Objection overruled. This is cross examination.

551

Mr. Rockwood: Exception.

The Witness: When it was first discussed we thought then that there were bills receivable, and that with what money we would put up would tide us over. But there was so much coming up that we knew nothing whatever about.

Q. That was right on, wasn't it? A. Not very long after, Mr. Hickox.

Q. Then and afterwards? A. It was after our discussions, yes.

552

Q. And after the transfer? A. Yes, it was after the transfer.

Q. Just how was this transfer carried out? Just exactly what were the details of the transfer of this coal property?

Mr. Rockwood: Objected to as immaterial.

The Court: Objection overruled.

Mr. Rockwood: Exception.

Testimony of Gardner Yerkes—Cross.

553

A. Why, they bought the property for \$200,000.

Q. That does not give me the details. Tell me just what steps were taken. You arranged or it was arranged that somebody should find the money, was it? A. Yes, sir.

Q. And was that somebody Mr. Chestnut? A. Yes, sir.

Q. Then did he bring the money over here to New York? A. No, sir.

Q. Where was the transfer completed? A. At Philadelphia.

554

Q. At the transfer who were present? A. Well, let me see: D. Stewart Robinson, attorney. Mr. Hampton. Mr. Late—and I am not sure whether Mr. Berry was there or not. I don't recall who the others were.

Q. Just what took place? Did Mr. Chestnut produce \$200,000? A. Yes, sir.

Q. And what did he do with that money? A. He handed it over to me.

Q. And what did you do with it? A. I gave him a receipt for it and turned over the property.

555

Q. You turned over some deeds to him, did you? A. I was ready to be prepared to turn it over to him.

Q. You did turn them over to him? A. They were being drawn up. The receipt was given to him, however, at that time, then the money was paid on a pro rata basis, to these creditors.

Q. Wait a minute. You say the receipt was given to him for that money, and I take it that the deeds were not transferred at that time?

556

Testimony of Gardner Yerkes—Cross.

A. I don't recall that they were. I think they were not fully prepared.

Q. To whom did you actually hand the \$200,000? A. I handed it in parcels to the attorney, Mr. Robinson.

The Court: What do you mean "in parcels?" That you drew checks of the company?

The Witness: No, I turned it over to him in cash.

557

Q. You turned over to Mr. Robinson the entire \$200,000, did you? A. Yes, sir.

Q. Did you know or did you see what Mr. Robinson did with that money? A. No, I could not say positively what he did do with it.

Q. What was the arrangement? A. I didn't make the arrangement.

The Court: Who was Mr. Robinson?

The Witness: He was the attorney representing the five principal coal creditors.

558

Q. You knew what the arrangement generally was, didn't you? A. I think the money was used by Mr. Robinson to immediately take up the notes that had been given—or to reimburse—to go right straight back to Mr. Chestnut.

Q. And I think you stated to your counsel this morning that the money was paid back by Mr. Chestnut, wasn't it, and that the deeds of the property were transferred to Mr. Chestnut in the first instance and then to some coal company that had been organized to receive it? A. Not in my testimony.

Testimony of Gardner Yerkes—Cross.

559

Q. Did Mr. Chestnut give a note and go to the bank with you to get the \$200,000? A. That is what I understood.

Q. And the repayment to him immediately of this \$200,000 was to enable him to take up his note? A. I didn't pay the money to Mr. —I paid the money to Mr. Robinson on behalf of these coal creditors. I simply gave it as my opinion that it went back.

Q. You knew from the discussion that that is what the plan was, didn't you? A. I thought it was the plan, but I don't believe it was brought out clearly in the discussion.

560

Q. You didn't suppose that Mr. Chestnut, a stranger, was going to produce \$200,000 for these properties, did you, as a purchaser? A. It was represented to us that he was, that then they were going to form a corporation and put the properties into that newly incorporated company.

Q. And the representatives at the conference were that the properties were to be transferred to this corporation, that Mr. Chestnut was merely acting as a sort of a dummy or conduit through whom the money would pass?

561

Mr. Rockwood: That is objected to. The witness has not said that.

Mr. Hickox: I am asking if it was so.

The Court: Objection overruled.

Mr. Rockwood: Exception.

A. No, I would not consider it that way. He was the counsel of the company. We under-

stood of course that these creditors were intended to be the active people in that company.

Q. And Mr. Chestnut was not really interested with that concern at all? A. I don't know whether Mr. Chestnut was to be interested in it or not.

Q. This property at the time that you transferred it you say was supposed to be worth or was valued in the transaction at how much? A. \$200,000.

563 Q. At \$200,000? A. Yes. That is the total property.

Q. Was that all the property that you had? A. Yes, the two coal properties and the two leases were all the physical assets that the company had.

Q. Did you have some coal at the time? A. No.

Q. In addition? A. No, not mined.

The Court: Did you have any accounts or bills receivable?

564 The Witness: About \$20,000, but we did not know at that time that the vice-president of the company had turned over part of that coal, and that the Brooklyn Edison Company never did get it, so that reduced it to about \$5,000.

The Court: Then the accounts receivable are reduced to about \$5,000.

The Witness: Yes.

Q. Was it also a part of the plan of transfer that the claims of these coal companies should be cancelled to the extent of \$200,000, and that

Testimony of Gardner Verkes—Cross.

565

they should not press you as to the balance? A. Yes sir.

Q. They did not press you as to the balance of it, did they? A. No, sir.

Q. And the property in fact— A. (Interrupting). They had everything that there was.

Q. The property in fact was not worth \$200,000 or anything like it, was it? A. In my opinion it was as a going property, worth practically that.

Q. Testimony has been taken down in West Virginia in which witnesses claimed that the property had an encumbrance of about \$55,000, and that it would not have been worth the amount of the encumbrance? A. That encumbrance was incurred by the purchase of the Stone mine and the Arden mine, and the equities in the Stone mine were worth practically what Mr. Chestnut paid for it as a going property, not after it has been lying idle for a couple of years and everything has commenced to deteriorate.

566

Q. Were they going properties then? A. Yes, sir.

Q. Were they actually being operated? A. Yes, sir.

567

Q. How long since you have taken any coal out of those mines? A. We have not—I don't know what they have taken out, we have not done anything since the transfer.

Q. You had not immediately before the transfer, had you? A. Well, for a very brief period I guess, during the upset of things.

Q. For two months at least? A. I could not say positively about that.

Q. About that? A. That is possible. It is hardly probable. When the attachment was put on, when that coal was libeled in Baltimore, that stopped everything.

Q. The properties never have been operated since, have they? A. Not to my knowledge.

Q. And the market for coal has gone down steadily, hasn't it? A. I haven't paid much attention to that feature.

569 Q. You know as a fact it has gone down, isn't that true? A. Yes, I know it has gone down from that time, yes.

Q. So that it has not been profitable to operate mines— A. (Interrupting) We could not operate it.

Q. Did you have any coal credits anywhere at that time, in November? A. After the coal was libeled we had no credits to amount to anything.

570 Q. You spoke of the debts that were liquidated and admitted. I think you said as of February. Have you indicated or will you indicate what the nature of those debts was? A. The steamship company's claims principally.

Q. Those steamship claims were all unliquidated at that time and all were disputed at that time, were they not? A. Some were disputed. I don't see how anybody can dispute a claim for a demurrage.

Q. They were disputed by the company, were they not? A. They were not disputed by the treasurer of the company.

Q. I am sorry that you did not have more to say about the company, then? A. You see, there is one point I would like to make clear to you,

and that is one reason why I have two years wanted to see somebody who had backbone enough to handle and straighten out this entanglement.

Q. This what? A. This entanglement of the affairs of that company. From the first of July, 1920—beginning the first of July there was any number of things done in the handling of the affairs of that company that were never permitted to get into the records of the New York office. Those things even at this late date somebody might be able to unravel. I had no knowledge, no one had a knowledge that anybody would substantiate claims amounting to over a million dollars. At the time these big claims came up I knew nothing whatever about them, and the president of the company claimed that he did not know anything about them.

572

Q. What were some of these liquidated claims that you speak of? What is the nature of them? A. I always considered those steamship claims liquidated, because they amounted to even more than what I suggested, but I think they would be reduced somewhat.

573

Q Have you included in your statement on direct examination these steamship claims among the \$100,000 that was liquidated? A There was \$55,000. in first mortgage bonds and \$55,000 in the Stone Mine notes, just those two items alone.

Q. Well, tell me what other items? A. And if you add the steamship companies claims to that, the Kohan Maru amounted to \$125,000, and the steamship Nicholas and Dunsted Hall amounted to \$245,000.

574

Testimony of Gardner Yerkes—Cross.

Q. When you stated a short time ago that there were liquidated claims of over \$100,000 due that the company was unable to pay, did you have in mind those two claims that you mentioned a few minutes ago, one of \$55,000 and the other of \$55,000 also? A. No, I had the Stone Mine notes in mind. The mortgage bonds were not due yet, but I had the others, and then all this accumulation of smaller amounts.

575

Q. The others amounted to how much? A. \$2600., about.

Q. You gave us the detail, and you mentioned two specific claims, amounting to \$55,000 each?

A. The Stone Mine notes were \$55,000.

Q. Was there a liquidated claim? A. When you say "liquidated" you mean it was admitted?

Q. And was it due? A. No, I don't think the notes were all due yet at that time, but they were coming due very rapidly.

Q. It was due or was not due, which? A. They were not due.

576

Q. And what was the next one of \$55,000? A. First mortgage bonds.

Q. Were those due? A. They were not due until later.

Q. It was due when? A. I cannot say positively. I think it was the last of May.

Q. Then the only liquidated claims were some of these smaller items? A. Fosburg & Mark, \$120,000.

Q. You did not include that in your statement of \$100,000, did you? A. No, I just gave that as their figure, \$100,000. I assume some of these things could be adjudicated or adjusted somewhat.

Testimony of Gardner Yerkes—Cross.

577

Q. What are some of these other items that you considered liquidated? A. We owed the Diamond Operating Company \$14,000.

Q. What was that for? A. That company was a subsidiary company and they owed for labor, and we guaranteed that, and also for store bills.

Q. Was that company owned in the same way that the Diamond Fuel Company was owned?

A. The Diamond Fuel Company owned that company.

Q. And what were some of the other items?

A. Colonel Bope had a claim against the company for \$12,000.

578

Q. He was the president of the company, was he not? A. Yes.

Q. What was his claim for? A. For moneys advanced.

Q. Was there any dispute about that claim?

A. Not that I ever heard of. They owed the attorney, Mr. Stripe, \$1,000, and Law & McCue, \$3,000.

Q. Were those claims for services previously rendered? A. Oh, yes.

579

Q. And what else? A. The Aetna Explosives, the Morgantown Coal Company.

Q. What was the Aetna Explosives claim for? A. \$1680.

Q. What for? A. For powder.

Q. Furnished? A. Yes, sir.

Q. All right; what is the next one? A. The W. R. Nethken & Company, \$2,568.

Q. What for? A. That is for coal.

Q. Read the items right along and tell me what they were for to shorten the cross examination a little bit? A. The Boulder Coal

580

Testimony of Gardner Yerkes—Cross.

Company, \$2,428.14, for coal. The Mercantile Coal Company, for coal, \$2,113.24. H. M. Crawford Coal Company, for coal, \$1653.

Q. Is that all? A. Including the Diamond Operating Company, \$14,000, and the Aetna Explosives for \$1680—American Express Company, \$38,000.

Q. What is that for? A. That was on money advanced and coal for them.

581

Q. What is that moneys advanced on coal for them? A. That is for a contract that was not filled.

Q. I am asking you for liquidated claims. A. You are asking me what my opinion of them is.

Q. It was not a liquidated claim, was it? A. As far as I am personally concerned I considered we owed that money.

Q. Possibly so, but you understand, do you, the distinction between a liquidated and an unliquidated claim? A. A liquidated claim as I understand it is one you admit and it is due, that the company admits.

582

The Court: Was that a claim for coal sold and delivered?

The Witness: No.

The Court: What was it?

The Witness: They were buying coal and that was the claim.

The Court: And they claimed you did not make proper delivery, is that right?

The Witness: Yes, they put in a claim for \$38,000.

The Court: So that was a vague claim, was it?

Testimony of Gardner Yerkes—Cross.

583

The Witness: Well, it was to some extent vague, but it was not altogether vague.

Q. It was a claim for damages on the part of the express company because you had not delivered coal? A. Partly for damages and partly for money advanced.

The Court: How much did they advance?

The Witness: I could not tell now.

584

Q. Have you given them all to us? A. Except these small items, the National Building Association, \$1420.45.

Q. What for?

Q. Past due? A. Yes, that was due. And without taking up a lot of time, there were small miscellaneous accounts amounting to probably \$1500 due, and the Baltimore & Ohio Railroad Company \$1837.

The Court: What is that for, freight?

The Witness: Freight.

585

The Court: Was that due and admitted?

The Witness: Yes, sir.

Q. You have given us all, have you now? A. Approximately all, yes, all that I have a record here.

Q. And you said that the Morgantown Coal Company was a creditor. Did they have an open account with you? A. No, I would not say

586 *Testimony of Gardner Yerkes—Cross.*

it was an open account with us at this office. The Fairmont office used to buy coal from them. They bought coal from several of the people down there.

Q. And were payments made from time to time? A. Yes, sir.

Q. Were payments made with particular relation to the deliveries? A. Most of the coal at that time was paid for before it was delivered, and they tried to do away with that. As soon as you get the car numbers you paid for the coal.

587

Q. You paid for it before it was delivered in general instances? A. It was loaded on the cars and passed the scales before it was paid for.

Q. You paid for it before you sold it? A. Oh, yes. I won't say we paid for it before we sold it, but we paid for it before we collected for it.

Q. Can you indicate when your last credit or payment to the Morgantown Coal Company was made? A. Not from anything I have here. I haven't any data here to tell from.

588

Q. Would your books indicate when the last payments were made to the various creditors? A. Yes, sir.

Mr. Hickox: That is all.

By Mr. Tibbetts:

Q. Do you have a statement of debits and credits of your creditors which you have a list of? A. No, sir.

Q. You have not the amounts paid to the various creditors? A. No, only the amounts paid on that \$200,000, purchase.

Q. But as to the other creditors you have nothing with you to show what was paid? A. No.

By the Court:

Q. In regard to this \$200,000, did I understand you to say, or to intimate that the credits made in favor of those coal companies were only made as security? Was that the arrangement? A. No, I did not say that.

590

Q. Well, what did you say? There was some talk, I thought, about giving them security? A. Well, they tried to bring out, in the discussion before the transfer was made, that it was in some way security. Then it was decided they would buy it up—that Mr. Chestnut would buy it, and then the amounts of money were turned over to them, and we, of course, were to charge them with the amounts paid, on our books.

Q. What arrangement did you make with them, or was anything said about a reduction of or security for their claims? I want to know what was said, not your conclusions A. Well, the reduction would be—in shipping coal you did not always know that you got the coal, because of the government complications, and everything of that kind. Now, the reduction would come by finding out what coal you actually did receive.

591

Q. I do not think that answers the question. Perhaps you did not understand it: I understood

592

Testimony of Gardner Yerkes—Cross,

that these credits on those accounts were not, or, at any rate, might not have been either as payment or security in full, but reduced the account; is not that so? A. Yes.

Q. Now, what was said about it at the time that the arrangement was made, who was there, and who did the talking, and what was said about it? A. That they would reduce their claims, if it was shown that the coal was not received. Now, whatever they reduced them, reduced whatever was in excess of the \$200,000.

593

Q. Well, was it said by anybody that the \$200,000 was to be a payment on account? A. Yes, sir, it was a payment on account, and we took receipts for it, and the receipts are right here.

Q. And who said that? Who arranged for that? A. The attorney, Mr. Stewart Robinson, of Philadelphia.

Mr. Hickox: May I see those for a moment?

594

(Papers handed to Mr. Hickox by the witness.)

The Court: Those were not offered in evidence.

Mr. Rockwood: I think they ought to be.

By Mr. Hickox:

Q. Was it part of the arrangement that the Diamond Fuel Company retained an option on the lands that were transferred, so that eventually they might get them back, if the claims were

settled? A. If the claims were settled the company would get the land back.

By Mr. Rockwood:

Q. Now, Mr. Yerkes, as I understand it, there were two coal properties, the Stone mine and the Arden mine? A. Yes.

Q. What was the amount of the mortgage on the Stone mine at the time of the Chestnut transfer? A. We thought it was \$55,000, but that, as I tried to state this morning—we sent \$50,000 down there to be paid, which would leave \$55,000 owing; but only \$25,000 was paid. Therefore, there was \$80,000 due. 596

Q. An \$80,000 mortgage? A. Yes.

Q. What was the amount of the mortgage on the Arden mine? A. About \$55,000.

Q. How much? A. About \$55,000.

Q. So that at the time of the transfer to Chestnut there were two mortgages, amounting to \$135,000, on the two properties? A. That is correct. 597

Q. That is correct, is it? A. Yes.

Q. And were those mortgages due? A. No.

Q. They were not due? A. No.

Q. But the money was owing? A. Yes.

Q. Were those purchase-money mortgages? A. No, sir. Yes, they were purchase-money mortgages.

Q. They were purchase-money mortgages? A. Yes.

Q. Now, who was Chestnut? A. One of them was.

598 *Testimony of Gardner Yerkes—Cross.*

Q. Which? The Arden? A. The Stone mine was a purchase money mortgage. The other was a bond issue put on it, to wipe out some indebtedness.

Q. Who was Chestnut? A. I don't know Mr. Chestnut.

Q. Had you ever seen him before this transaction? A. No.

Q. This transaction was handled by a lawyer named Stewart Robinson, in Philadelphia? A. Yes.

599

Q. And did Mr. Robinson represent the Seaboard Coal & Coke Company, Gordon B. Late Coal Company, Fisher Summit Coal Company, Westwood Coal Exchange, and H. J. Berry? A. Yes.

Q. And at that time were there other creditors also in existence, of the Diamond Fuel Company as you have described? A. Yes.

Q. Unliquidated claims? A. Yes.

Q. Were there suits pending against the company on the 29th day of November, 1920, the date of these transfers? A. I think not.

600

Q. Was the company in financial difficulties? A. Yes, it knew it was in financial difficulties.

Q. Was it able to meet its debts? A. No. It thought it was.

Q. At that time did Mr. Robinson cause a banker to come to the office where this transaction took place, and bring with him \$200,000 in money? A. No, the transaction was handled in the bank.

Q. Did the banker produce \$200,000 in money? A. Mr. Chestnut produced the money.

Testimony of Gardner Yerkes—Cross.

601

Q. Who gave the money to Chestnut? A. I did not see it given to him.

Q. Chestnut had \$200,000 in money, did he? A. Yes.

Q. And, as I understand it, he handed you that, and you divided it up in the proportion of the various debts; is that right? A. Yes.

Q. In other words, you put in one bundle \$21,097.40, and labeled it "Seaboard Coal & Coke Company"? A. Yes.

Q. Is that correct? A. That is not literally correct but it was turned over in the approximate amounts, and the receipts were given. 602

Q. That being the amount of each claim? A. Yes.

Q. And you did that with the claim of the Gordon B. Lake Coal Company? A. Yes.

Q. Was that procedure carried right through with the entire \$200,000, until the money was exhausted? A. If you will foot those up you will see that it comes out.

Q. \$200,000? A. Yes.

Q. And are these the receipts that Mr. Robinson, the attorney, gave? A. Yes. 603

Mr. Rockwood: I offer them in evidence.
Papers marked Exhibit 4.

Q. Was there any written agreement relating to this matter, concerning which Mr. Hickox examined you, or was it oral? A. It was oral.

Q. Was there any writing outside of the deeds? A. Yes, there was a brief memorandum as to how to obtain the properties back.

Q. Is that here? A. No, sir, I haven't it.

Q. Who prepared that? A. That was prepared by Mr. Robinson.

Q. As I understand it, Chestnut gave you \$200,000; you paid it over to Robinson, as attorney for the creditors, and you delivered a deed of all the coal properties, and that was a simultaneous transaction; is that correct? A. Yes.

Q. Now, who got that \$200,000 immediately back, if you know? A. I don't know positively. It was turned over, and receipts given for it.

605

Q. Whether you know positively or not, where did the \$200,000 go that Chestnut got? A. I think it went back into the bank.

Q. You think it went back into the bank? A. Yes.

Q. Therefore it was, so that his Honor will have the facts about it—it was simply a colorable transaction, having for its object the divesting of the Diamond Fuel Company of the title to its properties, and putting them in the name of Chestnut? A. Exactly.

606

Q. And that being accomplished, the creditors could not levy execution or process upon the real properties, because they were in the name of Chestnut; is that not so? A. Yes, sir.

Q. What? A. Yes, sir.

Q. In other words, that transaction divested the Coal Company of its properties? A. Yes, sir.

Q. After that transaction, the company was divested of its properties? A. Yes.

Testimony of Gardner Yerkes—Cross.

607

Q. Without having anything put into the treasury of the Coal Company as a result of that transaction? A. Yes.

Q. And leaving the Coal Company owing the admitted debts that you have described to his Honor? A. Yes.

Q. Now, was that done, if you know, for the purpose of preventing creditors from levying upon the properties of the Coal Company? A. I think it was done to—

Q. (Interposing) No. Was it done for that purpose, as you understood it? A. As far as the steamship company was concerned, yes. 608

Q. It was done for that purpose? A. Yes.

Q. And was the libel suit of the steamship companies at that time pending? A. Yes, sir.

Q. Well, then, it was the thought, was it, that the creditors of the Diamond Fuel Company—

Mr. Hickox (Interposing): If your Honor please, counsel is gently suggesting one thought, and then another thought. This is his own witness, and he is not entitled to do that. 609

Mr. Rockwood: Brother Hickox asked him as to his hopes. I think we should be permitted to ask him as to his thoughts. He is not my witness.

Mr. Hickox: You put him on.

Mr. Rockwood: He is a witness, but not my witness.

Q. Did you understand clearly, when you went here, that the transaction was simply one

610 *Testimony of Gardner Yerkes—Cross.*

By Mr. Rockwood:

to get the title of the properties away from the Diamond Fuel Company, A. Why, no, I did not personally. I understood it to be an amicable working arrangement with these principal coal creditors.

Q. Did you understand it while you were there?

A. How is that?

Q. While you were there you got the understanding to which you have not testified? A. Oh, yes.

611

Q. Now, then, the properties having a mortgage of \$135,000 on them—

The Court (Interposing): Are you trying to prove an act of bankruptcy now?

Mr. Rockwood: Yes.

The Court: Is that alleged in the petition?

Mr. Rockwood: To hinder and delay.

The Court: I see. I did not know that was alleged.

Mr. Rockwood: Yes.

612

Q. The properties being mortgaged for \$135,000, and the amount of cash in that deal being \$200,000, that put a value upon the properties of \$35,000 did it not; that is \$200,000 over and above the mortgages, did it not? A. Yes, sir.

Q. And was that value arrived at in any other way than by simply taking the amount of these creditors' claims? A. No, that was about what they were considered to be worth at that time.

Q. And did you and the other officers know at the time of this transaction that there were all these other outstanding claims unpaid? A. Yes, but we did not know—no. When it was arranged, we did not know anything about the amount of the steamship claims.

Q. But outside of that, the other claims that you have testified to— A. Oh, yes.

Q. You knew those claims existed? A. Yes.

Q. You have spoken of the Diamond Operating Company in answer to counsel. Was that company one of which the Diamond Fuel Company owned the stock? A. Yes. 614

Q. That was an operating company? A. Yes.

Q. Is that also in bankruptcy? A. I understand it is.

Q. Yes. Now, the petition in this case was filed against the Diamond Fuel Company on the 25th day of February, 1921, as you understand it, was it? A. Yes.

Q. And the Diamond Fuel Company has never made any attempt to resume operations of its business? A. No, sir.

Q. It has done nothing, has it? A. No, sir. 615

Q. Has the Diamond Operating Company ever attempted to resume business? A. Not to my knowledge.

Q. Both companies are inoperative and have been since that date? A. Yes.

Mr. Rockwood: That is all.

616 *Testimony of Gardner Yerkes—Re-cross.*

Re-cross Examination by Mr. Hickox:

Q. Just tell me, please, in this transaction in the bank, what you did, physically, with the \$200,000 that you received from Chestnut? Did you hand it over, as you received it, from Chestnut, to Mr. Robinson, and obtain these receipts that have been referred to? A. Yes, sir.

Q. Did you give it to him in bulk, just as you got it? A. Practically so, yes. I first counted all the money to see that there was \$200,000 there.

617 Q. And then handed it all over directly to Robinson? A. It was apportioned according to the amounts shown by the receipts.

Q. Who apportioned it? A. That had been figured out there, the amounts due each one, and the proportion we agreed to pay them.

Q. What you did, physically, was to hand all the money to Robinson? A. Yes, sir.

Q. At one time? A. Yes, sir.

Q. And receive these receipts in exchange? A. Yes, sir.

618 Mr. Hickox: That is all.

Re-direct Examination by Mr. Rockwood:

Q. I understood you to say you apportioned the debt of each, and parcelled out the money and labeled it, and handed it to Robinson? A. No, I did not say it was labeled. There was a little memorandum attached to the papers that showed the amounts.

Testimony of Gardner Yerkes—Re-direct.

619

Q. Was that the memorandum made at the time—that yellow paper (handing paper to witness)? A. Yes.

Q. Is that the way the money was paid out, in five amounts? A. No, it was turned over—so much money was turned over to Mr. Robinson, and he counted it, and then, according to that he gave the receipts.

Q. And he gave separate receipts for each creditor? A. Yes, sir.

Q. And was it the understanding that these creditors should have claims against the company for any amount in excess of the amounts that were supposed to have been paid at that time? A. Yes, sir.

620

Q. What? A. If they could show the coal was actually delivered.

Q. Until the petition in bankruptcy was filed here it was claimed, was it not, by the Diamond Fuel Company, that this was a valid transfer, and that these creditors owned the property? A. Yes.

Q. And it was asserted by Mr. Robinson that the transfer was a valid transfer vesting title in these creditors? A. Yes.

621

Q. And until this petition in bankruptcy was filed, there was never any change in that contention by your company?

Mr. Hickox: If Mr. Rockwood is asking about something that took place at the conference, that is all right.

Mr. Rockwood: No.

622 *Testimony of Gardner Yerkes—Re-direct.*

Mr. Hickox: If he is asking about what somebody said since the conference, I object to it, because it is immaterial and hearsay.

The Court: I am not sure but what it is impeaching the witness.

Mr. Rockwood: I want to show how they held it out; that they claimed it was a valid transfer right up to the time the petition was filed.

623 The Court: Well, there is no jury here. I will allow it.

By Mr. Rockwood:

Q. Is it a fact that the Diamond Fuel Company, through its officers, held out to creditors that this was a valid transfer to Chestnut, right up to the time of the filing of the bankruptcy petition? A. To my knowledge there was never anything said to the creditors about it.

Q. Well, whomsoever it was discussed with it was held out as a valid transaction, was it not?

624

Mr. Tibbetts: It seems to me that counsel is endeavoring to go into some question of fraudulent transfer, or something of that sort. The only act of bankruptcy alleged here is that certain money was turned over to these specific creditors, with intent to prefer them to other creditors.

The Court: I thought he said there was an allegation about hindrance and fraud?

Testimony of Bernard S. Barron—Direct.

625

Mr. Rockwood: I will not press it, Judge. That is all.

(Witness excused.)

Mr. Rockwood: I will call the attorney for the receiver, Mr. Barron.

BERNARD S. BARRON, called as a witness on behalf of the Petitioning Creditors being duly sworn, testified as follows:

626

Direct Examination by Mr. Rockwood:

Q. Mr. Barron, you are a member of the bar?

A. Yes, sir.

Q. And a member of the firm of Stires & Barron, of this City? A. Yes.

Q. And counsel for the receiver, Mr. Stripe?

A. Mr. Johnson.

Q. Mr. Johnson? A. Yes.

Q. What was the amount, or what is the amount of cash which has come into the hands of the receiver of the Diamond Fuel Company since its appointment? A. As far as I recall—

627

Mr. Hickox: Is that relevant?

The Court: I think so.

Q. How much? A. About \$600.

Q. About \$600? A. Yes.

Q. There was an account receivable referred to by the treasurer of the company, of \$20,000 from the Edison Company? A. Yes.

628 *Testimony of Bernard S. Barron—Direct.*

Q. What has that finally resulted in? A. As I recall it, the statement was made by the Brooklyn Edison Company that certain coal that should have been delivered to them, in the Tide-water pool, was never delivered, and the claim was subsequently reduced to \$5,808 and some cents. We then got an order from this court for leave to compromise that claim, and on the Brooklyn Edison Company checking up their accounts they found other items of coal which had never been delivered, which reduced the claim to about \$3,400.

Q. Has that been paid by the receiver? A. No, sir. And order is before this court permitting it to be paid, but it has not been signed.

Q. Besides that, is there any other property of any nature which you know of, that will come to the receiver? A. No, sir, none that I know of.

Q. Have there been a number of claims filed by creditors, with the receiver? A. Yes, there have.

Q. Claiming moneys due antedating February 25, 1921? A. Yes.

Q. What is the total amount of claims so filed with the receiver, in dollars and cents? A. I don't think I can say offhand, Judge.

Q. Well, about? A. There are a great number of claims that were filed—I should say about \$30,000.

Q. About \$30,000? A. Yes, which does not include the admiralty claims in Baltimore, or other claims that have been discussed here to-day.

Testimony of Thomas F. Barrett—Direct. 631

Mr. Rockwood: That is all.

(Witness excused.)

Mr. Rockwood: I will call Col. Barrett of West Virginia.

THOMAS F. BARRETT, called as a witness in behalf of the Petitioning Creditors, being duly sworn, testified as follows:

Direct Examination by Mr. Rockwood: 632

Q. Mr. Barrett, you are a member the the Bar of West Virginia? A. Yes, sir.

Q. And in practice at Clarksburg? A. Yes.

Q. What is the name of your firm? A. It is Thomas F. Barrett. We had a firm, but it has been dissolved.

Q. Are you acting as counsel in West Virginia for the Ancilliary Receiver in this case? A. I am.

Q. Who is the Ancillary receiver? A. Mr. R. E. Talbott, cashier of a bank in Philippi, West Virginia. 633

Q. By whom was he appointed? A. By Judge Baker. The original receiver, Mr. Cochran, resigned during last snummer. He was appointed by Judge Pritchard, now dead.

Q. What is the name of the receiver? A. R. E. Talbott.

Q. What amount of assets has come into the hands of the Ancillary Receiver in West Vir-

684

Tetsimony of Thomas F. Barrett—Direct.

ginia? A. At the time of his appointment there were two mines, one situated in Lewis County, West Virginia, and one in Barber County, West Virginia. The one in Lewis County has since been sold, under a foreclosure proceeding, and the other mine, in Barber County, West Virginia, is still in the hands of the Ancillary Receiver.

685

Q. And the property that was sold under foreclosure, did it realize the amount of the mortgage? A. No, sir, it did not.

Q. How much did it realize? A. There was a vendor's lien, amounting to \$55,000, and some accumulation of interest, at the time the foreclosure took place, and it sold for \$44,000.

Q. And the mortgage was how much? A. \$55,000.

Q. So there was a deficiency of \$11,000 on that particular property? A. Substantially so.

The Court: And that was one of the properties that was deeded to this man Chestnut?

686

The Witness: Yes.

Q. Included in the Chestnut deed? A. Yes.

Q. What happened to the other property? A. The other property has not been operated since the appointment of the receiver, and it is just lying there unoccupied.

The Court: Is there any lien on that mine?

The Witness: There is, your Honor, \$55,000; that much of unpaid notes, se-

Testimony of Thomas F. Barrett—Direct.

637

cured by a mortgage, the original of which was \$125,000, but it has been paid down to \$55,000. There is some accumulation of interest there. I do not know just how much.

Q. Is there interest and taxes due on that?

A. I think the receiver has paid the taxes, but there is considerable interest due.

Q. Now, has an appraisal been made of that property? A. Well, not except just a general appraisal. Not an expert detail appraisal.

638

Q. Have you been over the property? A. Yes.

Q. Are you familiar with the values of coal properties in West Virginia? A. I think I am, yes.

Q. Have you had considerable experience in that line? A. Yes.

Q. Have you bought and sold coal properties, and known of them being bought and sold in West Virginia? A. Yes.

Q. Similar to this? A. Yes.

Q. Is this known as the Arden mine? A. Yes.

Q. What was the value of this Arden mine in West Virginia on the 25th day of February, 1921? A. Well, I should not express its value as being over \$125,000 at any time.

639

Q. Is that exclusive of the mortgage or inclusive? A. Inclusive of the mortgage.

Q. That would make an equity of \$65,000 above the mortgage? A. Substantially so, but there is no such equity now, and I do not believe there was then. That was a pretty liberal appraisal.

Q. Not to exceed \$65,000? A. No, sir.

640

Testimony of Thomas F. Barrett—Direct.

The Court: What would be the equity in the other piece of property on the 25th of February?

The Witness: Well, your Honor, my candid opinion is there never was any in it.

The Court: Was it sold for less than the lien on it?

The Witness: It sold for \$44,000, and the lien was \$55,000, with an accumulation of interest and costs.

641

Q. Has that Arden mine property come into the possession of the Receiver? That is, has Chestnut given up his deed, or does he still hold it? A. The Receiver has possession of it, under that order of the Court, subject to whatever might be determined, if this company should make an adverse claim, but no such claim has ever been made.

Q. Chestnut has not yet given up his claim or re-deeded the property? A. No, the title to that property stands in the name of the Barbour-Lewis

642 Coal Company.

Q. That is, Chestnut transferred it to them? A. Yes.

Q. And they hold it? A. Yes.

Q. And they hold it adversely to the Diamond Fuel Company? A. That would be so, in accordance with the record, but there has been no claim made.

Q. But speaking entirely on the record, the title they hold is adversely to the Diamond Fuel Company? A. Yes.

Testimony of Thomas F. Barrett—Direct.

643

Q. And they held it so adversely on the 25th of February, 1921? A. That is correct.

The Court: Has the Receiver gone into possession there with their consent?

The Witness: No, he has gone into possession against their protest.

Q. But by order of the Court? A. Yes, he has taken possession by order of the Court, but they objected to it.

Q. So that considering only the record title is this a proper summary of the situation: That the Stone mine was sold for \$11,000 less than the mortgage, and the Arden mine is held adversely by the Barbour-Lewis Coal Company? A. Yes.

644

Q. And the money or coal in Baltimore is held under the attachment referred to? A. That is substantially correct.

Q. Has the company any other physical assets to which it is entitled outside of small quantities of office furniture and the bills receivable which the Receiver's attorney has testified to? A. I can only speak for the Receiver in West Virginia. I am his attorney. No other property has come into his possession, except this.

645

Q. And do you know of any other? A. I do not know of any other in West Virginia. There is some stock, I believe, of the Diamond Operating Company, so-called, but that is in the hands of the Receiver in Bankruptcy also.

Mr. Rockwood: I think that is all.

646 *Testimony of Thomas F. Barrett—Cross.*

Cross Examination by Mr. Hickox:

Q. Now, Mr. Barrett, you have spoken about the appraisal of the Arden property, in your opinion. Are you aware of the fact that witnesses were examined down in Carksburg on this subject? A. I am. I was not present, though.

647 Q. And you know that witnesses stated there that they considered this property never did have any value above its indebtedness—I mean since the transfer? A. I don't know. I was not present at the taking of these depositions, and I have not had an opportunity to read them since, so I don't know just what they did testify to.

Q. Well, do you think that there really was any equity in that Arden property? A. Well, that is all a matter of opinion. It is very difficult to tell. We thought there was an equity in the other property, but when we came to sell it, it vanished.

648 The Court: The Arden property is the property—

Mr. Hickox (Interposing): That has not been sold.

The Court: In which he has said there was an equity of around \$60,000?

Mr. Hickox: But it has not yet been sold.

Q. You treated the properties as if you thought there was an equity in them? A. We hoped there might be, at the time the Receiver

was appointed, but we have had occasion to change our minds seriously.

Q. And your view is now that there is not any equity at all? A. Well, if the Arden mine is sold under foreclosure, or under a judicial order, it would hardly bring more than the amount of the lien. If it were sold to some person who wanted to buy a coal property, it might be an entirely different story. They might pay \$50,000 for the equity, or even more.

Q. Or they might not pay as much? It depends entirely on whether somebody particularly wanted it or not? A. Yes, entirely so. 650

Q. And that has been true ever since the transfer, has it not? A. No, I would not say that. At that time the coal business was in a much healthier condition than it is now.

Q. Well, it has not been operating since the transfer, has it? A. No, sir.

Q. So, is not the situation exactly the same— A. (Interposing) The physical situation is the same, but the situation with respect to value is not the same. There has been quite a depression since that time. 651

Q. There have not been any transfers, have there? A. There have been none of this property, of course. There is a very serious depression that has taken place in the coal business, which has wiped out the apparent equities that existed before it came on.

Q. Well, that depression started in the summer of 1920, did it not? A. No; it started about—well, yes, it began along in the latter part of the summer of 1920.

652 *Testimony of Thomas F. Barrett—Cross.*

Q. The business came personally to a standstill, did it not, very soon after that? A. Not then, but it came along early in 1921; about February, 1921.

Q. But it was not profitable to operate this mine at any time since the transfer was it? A. I would not say that. It might have been profitable to operate it for a while. It is not profitable to operate it now.

653 Q. It was not operated, was it? A. No, the receiver had no capital to operate it with.

Q. No; I mean long before that. A. Yes, I understand it was operated up to the time the receiver took charge of it.

Q. By whom? A. By the Diamond Operating Company I think. They were owned by the Diamond Fuel Company, but it was a corporation called the Diamond Operating Company, which seemed to be in charge of its operations.

Q. But they passed out in November, did they not? A. November when?

654 Q. 1920. A. No, I do not understand they did.

Q. Well the testimony has been here that this mine was transferred in November, 1920? A. Well—

Q. (Interposing) So are you not a little bit in error in suggesting that the Diamond Operating Company operated this mine until the receiver took charge of it? A. No, I think the Diamond Operating Company, under some arrangement made at the time that preferential transfer, as you claim, was made—I think at that time they arranged to have the Diamond

Testimony of Thomas F. Barrett—Cross.

655

Operating Company go on and operate the company. That seems to be the situation as disclosed by the documents that came into my possession.

Q. You can not state that positively? A. As positively as I can state anything, I know that the Diamond Operating Company was operating the mine up to the time the receiver took possession of it.

Q. You cannot state what the results of the operation were? A. Oh, no, I can not speak of that. 656

The Court: When was this sale of the piece of coal land which yielded less than the mortgage—in what month, do you know, and what year?

The Witness: Yes, your Honor, it was made in August, I think, of this year, or of last year, I mean.

The Court: 1920?

The Witness: 1921.

The Court: 1921.

The Witness: Yes, last August. 657

The Court: Is there anything more of this witness?

Mr. Rockwood: That is all.

By Mr. Kiendl:

Q. This Arden mine has been conveyed a great many times in the last ten years has it not? A. Yes, sir, it has.

Q. Do you know the prices it brought at those various sales? A. No, I do not. I have learned

658 *Testimony of Thomas F. Barrett—Cross.*

it has gone through bankruptcy two or three times. It was in bankruptcy when it was sold to this company.

Q. It was sold at forceclosure two or three times, was it not? A. I believe so.

Q. But you do not know the prices realized at any of those sales offhand? A. No, sir.

Mr. Rockwood: We rest, your Honor.

Mr. Hickox: We rest.

Mr. Kiendl: Is the case closed?

659

The Court: Yes.

Mr. Kiendl: The intervening creditors move for an adjudication of bankruptcy, as prayed for in the original petition.

Mr. Rockwood: And the petitioning creditors make the same motion.

Mr. Hickox: We oppose the motion. We think the original petition should be dismissed.

660

The Court: Why?

Mr. Hickox: Because it appears, in the first place, that this petition is fatally defective. The statute requires three petitioning creditors, and the proof shows that only two of the petitioning creditors were, in fact, creditors.

The Court: How about the intervening ones? Could they not bolster up the petition?

Mr. Hickox: They might bolster up the petition, but it is an intervening petition, and

the adjudication would then be on the intervening petition, and not on the original petition. The original petition does not bring the matter within the jurisdiction of the Court, because the jurisdictional requirements of the statute must be complied with, and if they are lacking, the petition is just as fatally defective because three petitioners are not properly shown to exist, as if in fact the petition showed on its face that it did not comply with the statute, or just as if the petition were fatally defective in not alleging a proper act of bankruptcy. That has been determined by this court.

662

The Court: That is true, but in case an intervening petitioner comes in, why can the court not adjudicate, provided they have proved enough I am not saying that they have, because I have not the proof in mind—but if there are enough claims before the Court, and enough acts of bankruptcy alleged, what difference does it make how many petitioners are required?

Mr. Hickox: It might make some difference, your Honor. If an intervening petitioner comes in, the adjudication must be on the intervening petition, because that is what makes the claim against the bankrupt good. That is the circumstance that gives jurisdictional facts and features which are necessary to enable the Court, to act. For instance, we had a case here some time ago, before Judge Mayer, where the allegations with respect to acts of bankruptcy were regarded as insufficient and defective, and after considerable time one of the petitioning creditors—the very same petitioning creditor—

663

sought to amend their petition by alleging details which would be necessary to comply with the statute, as constituting acts of bankruptcy, and the Court held that they could not blow the breath of life into a corpse; that the original petition simply did not exist—if it was fatally defective, it did not exist. You could, perhaps, have an adjudication on an amended petition or an intervening petition, if somebody filed it, but the adjudication would have to be on that intervening petition, and the original petition would have to go by the board. It was of no more effect than if it was never filed. Let us suppose, for instance, that in the case at bar there had been three petitioners or creditors alleged, no one of whom was shown to be a creditor of the company. Then, after a month or two months or three months, or any length of time which you please, has elapsed, a whole bushel of good creditors seek to intervene, and to bolster up the petition, which never did have any validity. I submit it is perfectly plain that the Court could not do that, because that would open the door for any amount of fraud. What the statute requires is very clearly stated. Parties who come in to have a concern adjudged bankrupt must comply with the statute. If they fail, they have no standing in Court: If they have partially complied with the statute, and then other creditors, by an intervening petition, seek to bolster up the defect, you must have an adjudication on the intervening petition, and that is the reason why the intervening creditors did come in, of course.

The Court: Is it more than four months—is that what you are driving at?

Mr. Hickox: Yes.

The Court: What authority have you on that proposition?

Mr. Hickox: I have the authority of Judge Mayer, that I spoke of.

The Court: Did he write an opinion?

Mr. Hickox: Yes, he did. I haven't got the full opinion, but it has been reported. His opinion was in 267 Federal, at 303.

668

Then, we have a case decided by the Circuit Court of Appeals for the Eighth Circuit, where substantially a similar situation was presented. An involuntary petition was filed alleging preferential payment as an act of bankruptcy. All the petitioning creditors had previously assented to a general assignment. Subsequently, and more than four months after the alleged preference, other qualified creditors joined in the petition. Now, the District Court allowed the petition to stand, and the Circuit Court of Appeals said it could not stand. The Court considered that the original petition was completely void, because the original petitioners being disqualified, were not in any better position than mere strangers. That is in 213 Federal Reporter, at 190.

669

The Court: Is there anything against that?

Mr. Kiendl: If your Honor please, the bankruptcy statute specifically provides that creditors other than the petitioners may come in at any time and file their petition.

Mr. Rockwood: And it says that the applicant becomes as much a petitioner as if he had joined in the original petition.

The Court: Is that the text book or the statute?

Mr. Rockwood: That is the text book, your Honor.

Mr. Hickox: There have been petitions where intervening creditors have come in, and the petition has been held good, but it has been held good as of the date of the intervening petition, and only as of that time.

671 The Court: There is great force in that, as a matter of reasoning.

Mr. Rockwood: May I ask counsel if he is contending that the original petitioning creditors were not creditors; is that his argument?

Mr. Hickox: I certainly am.

Mr. Rockwood: Where is there proof of that?

Mr. Hickox: The proof is that the Pittsburg & West Virginia Coal Company is not a creditor.

Mr. Rockwood: They have not offered any proof; they have offered nothing.

672 Mr. Barrett: That is a matter to be settled before the referee. As matter of fact, there have been filed here, two, or, I think, three intervening petitions against which there is no defense.

The Court: The Pittsburg & West Virginia Coal Company—you have got to prove that they were a creditor.

Mr. Barrett: We have to prove that before the referee.

The Court: Why do you not have to prove it right here?

Mr. Rockwood: Well, we can prove it right here.

Mr. Hickox: The witness admitted on the stand that the Pittsburg & West Virginia Coal Company were not creditors.

Mr. Rockwood: I do not think he said that.

Mr. Hickox: Oh, yes, he did.

Mr. Rockwood: I do not recall it.

Mr. Hickox: This is no oversight at all. When the original petition was filed, the alleged bankrupt concern put in an answer, in which it denied that the Pittsburg & West Virginia Coal Company was a creditor, and that answer remained until it was withdrawn today. Now, these other parties, because of that fact, and because the books of the concern, as the treasurer has said, show that the concern was not a creditor, filed an intervening petition alleging a number of other creditors, and before they did it, they came and talked with me on the subject—I am speaking aside from the record of today—and they stated that they did not consider that this Pittsburg & West Virginia Coal Company was a creditor.

674

Mr. Rockwood: I wonder if that ought to go on the record.

675

The Court: I do not think any of these speeches should go on the record. I will strike it out.

Mr. Rockwood: I ask leave to open the case to prove that we have a claim here of the Pittsburg & West Virginia Coal Company of \$15,000 or thereabouts.

The Court: All right; I will allow you to do that.

Mr. Hickox: Exception.

676 *Testimony of Thomas F. Barrett—Recalled—
Direct.*

THOMAS F. BARRETT, recalled:

Further Direct Examination by Mr. Rockwood:

Q. Mr. Barrett, do you know the Pittsburg & West Virginia Coal Company? A. Yes.

677 Q. Were you an officer of that company on the 23rd day of February, 1921? A I was a stockholder and a director and an officer a part of the time, and I think I was at that time, yes.

Q. Is the Pittsburg & West Virginia Coal Company a corporation? A. Yes.

Q. With its principal offices where? A. What is that?

Q. Where was its principal place of business? A. At Fairmont, West Virginia.

Q. Was the Diamond Fuel Company on the 25th day of February, 1921, and prior thereto, indebted to the Pittsburg & West Virginia Coal Company? A. It was.

678

Mr. Tibbetts: I object to that as a conclusion.

The Court: I will sustain the objection.

Q. What were the relations between the Pittsburg & West Virginia Coal Company and the Diamond Fuel Company prior to February 25, 1921, if you know?

Mr. Hickox: I object to that.

Testimony of Thomas F. Barrett—Recalled— 679
Direct.

The Court I will overrule the objection.

The Witness: Prior to October 29 the Pittsburg & West Virginia Coal Company received from the Diamond Fuel Company an order for 29 carloads of coal—

Mr. Hickox: (Interposing) I object to this.

The Court: Objection sustained. It was 680
in writing, was it not?

The Witness: Yes.

The Court: All right.

Q. Have you got the writing?

The Court: I suppose that is the objection.

Mr. Hickox: Yes.

Q. Have you the writing here? A. No.

Mr. Rockwood: Then, I shall have to 681
ask leave to get it, if that is disputed.

The Witness: I know of my own knowledge, that they owed the money and the amount of it, without the writing.

Mr. Rockwood: He knows all about it.

The Court: Well, I cannot help that, if it is in writing.

Q. You havent got that paper, have you? A.
No, I have not.

682 *Testimony of Thomas F. Barrett—Recalled—
Direct.*

Q. Do you know if, prior to the 23rd day of February, 1921, the Pittsburg & West Virginia Coal Company delivered and sold any coal to the Diamond Fuel Company?

Mr. Hickox: I object, unless this witness can testify that the transaction took place through him personally.

Mr. Rockwood: It did, and he knows all about it.

683

Q. Did the transaction take place through you?
A. Not through me, no, sir.

Q. Did you know of that sale? A. Yes, sir, I knew of it.

Q. You had personal knowledge of it? A. Yes.

The Court: How do you know?

The Witness: I know it because I have been in and about the office there—

684

The Court (Interposing): But it was an arrangement made in writing, was it not?

The Witness: Well, partly in writing, and partly over the telephone. It was a matter of ordering coal. The entire transaction was not in writing.

Mr. Hickox: The witness stated that it was in writing before.

Q. You say it was partly in writing and partly verbal? A. Yes.

Testimony of Thomas F. Barrett—Recalled— **685**
Direct.

Mr. Rockwood: Whether it was in writing, I submit, is immaterial, if they got the coal.

The Witness: The order was received over the telephone.

Mr. Hickox: Did you receive the order?

The Witness: No.

Mr. Hickox: Then, I object.

The Court: Objection sustained. **686**

By Mr. Rockwood:

Q. Do you know of your own knowledge that the Pittsburg & West Virginia Coal Company delivered or sold coal to the Diamond Fuel Company? A. I do.

Mr. Hickox: I object, since the witness has said that the transaction was not through him.

The Court: That is a perfectly good objection. **687**

Mr. Rockwood: Is he putting me to proof on the actual delivery of the coal?

The Court: I suppose he is.

Mr. Rockwood: Then, I will have to prove it—that they got the coal.

The Court: Well, you can do that.

Mr. Hickox: I think they ought not to be permitted to do that.

The Court: I shall adjourn the case. I am not going to give you a preference,

688 *Testimony of Thomas F. Barrett—Recalled—
Direct.*

if you are not entitled to it, for \$100,000, because they have been slack,—and they undoubtedly have.

Mr. Hickox: It is not merely a question of being slack. We have a verified answer of the alleged bankrupt that they never did have the Pittsburg & West Virginia Coal Company as a creditor.

Mr. Ellenbogen: Which we have withdrawn.

689

Mr. Hickox: It does not make any difference. That was a verified answer.

The Court: I can not control the large amount of money that you claim a preference in, because the bankrupt has been slack. These are creditors who want to put in proof, both petitioning and intervening creditors.

Mr. Ellenbogen: There is \$110,000 in cash down there.

690

The Court: They came up here without any idea of what I was going to require, apparently, although I told them at the time of the call what I thought was the law.

Mr. Hickox: Well, if this matter is going to be opened up again, against which we protest, we shall have to have the books of the concern produced here, and further examination of the officers.

Mr. Barrett: If your Honor please, I came here all the way from West Virginia, and with the courtesy of the court,

*Testimony of Thomas F. Barrett—Recalled—
Direct.*

11

I think I should be permitted to take some part in this case. I took occasion to examine the law very carefully upon these questions before I came, and I will say to your Honor that I believe that the whole weight of authorities is to the effect that where other creditors have intervened, as is the case here—not these attaching creditors, but creditors whose claims are liquidated and uncontested, the whole weight of authorities, without a single exception that I have been able to find, hold that where that is the fact, that the other creditors intervening has the effect of sustaining the petition.

692

The Court: All right. If you are prepared to rest where you are, without putting in any more proof, you may, but do not ask me to reopen it.

Mr. Rockwood: We do not want to rest. We want to reopen the case.

The Court: Very well. Then there is no use arguing it now, because I will have to hear argument later, if it is opened. I made a superficial examination myself in another case, and I could not find anything that was quite on this point; but it seems to me that where a creditor interposes an answer, that it imposes upon whatever petitioning creditors there were all the burdens they would have had if they had been the petitioning creditors.

693

Mr. Rockwood: As I understand, the

694 *Testimony of Thomas F. Barrett—Recalled—
Direct.*

question will be taken up on the adjourned date as to the validity of the proof of the petitioning creditors.

The Court: Yes. Do you want a bill of particulars, Mr. Hickox?

Mr. Hickox: Yes.

695

The Court: All right. You will state how the contract was made, whether oral or in writing; and if in writing, produce a copy of the writing; if oral, state when and with whom, and the substance of the oral conversation, and if part one and part the other, combine the two features, and give it in a bill of particulars.

Mr. Rockwood: Within five days, say?

The Court: Yes. I will put it down for January 30, 1922, at the head of the calendar.

696

Adjourned to Monday, January 30, 1922,
at 10:30 o'clock A. M.

New York, February 1, 1922.

APPEARANCES:

NASH ROCKWOOD, Attorney for Petitioning Creditors,

Thomas F. Barrett, R. H. McNeill, George W. Sage, of Counsel.

STETSON, JENNINGS & RUSSELL, Attorneys for Intervening Petitioning Creditors, 698
Frederick W. Girdner, of Counsel.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING, Attorneys for Intervening Objecting Creditors,

Charles R. Hickox, D. M. Tibbetts, of Counsel.

FRANK E. STRIPE, Attorney for Respondent,

J. K. Ellenbogen, Otto Gillig, Manning Stires, of Counsel. 699

Mr. Hickox: We have reached this stage in the matter—that two weeks ago Monday, after testimony had been taken and both sides closed, they made a motion for an adjudication, and so

soon as my views or arguments were developed they immediately moved to reopen the case and offer proof that one of the intervening petitioning creditors was really a creditor. The situation at that time was that the Pittsburgh & West Virginia Coal Company, according to the Treasurer of the concern was not a creditor of the Diamond Fuel Company.

The Court: Have I got that in my notes? Did the Treasurer go on the stand?

701 Mr. Hickox: Yes, he did. He said according to the notes of the concern they were not creditors.

The Court: And he did not know anything about it?

Mr. Hickox: No.

The Court: Do you agree to that?

Mr. Hickox: It is in the minutes.

702 Mr. Barrett: If your Honor please, I am sorry to be engaged in constant dispute with counsel here about the small details of this case. The fact is that evidence to establish the account of the Pittsburgh & West Virginia Coal Company was in progress and the evidence was objected to because certain orders said to be in writing were not here, and the case was adjourned until that evidence could be brought here, and that is all there is of it.

The Court: There are not any such orders, are there?

Mr. Barrett: Yes, sir, your Honor, as I just stated.

The Court: Covering this excess shipment?

Mr. Barrett: Not covering the excess shipment, but there are letters showing that the defendant acknowledged the receipt of this coal and used it for its own purposes, and there are records of the Baltimore & Ohio Railroad covering the transfer, weighing and delivery of the coal to the defendant corporation.

Mr. Hickox: This attorney became a witness when your Honor permitted the case to be reopened and attempted to say that a written order was given for this coal by the Diamond Fuel Company. When an objection was made that the written order must be produced, he said the order was down in West Virginia. They asked for an adjournment of two weeks to enable them to obtain that testimony, and if I go further with respect to this bill of particulars, so that your Honor will have it quite clearly in mind, your Honor directed that they should within five days serve us with the bill of particulars stating with whom the transaction took place on which they relied, whether it was oral or in writing, and if it was partly oral and partly in writing they should produce the writing and state who the individuals were, the time when, &c.

704

705

Now they refused to do anything of that kind; they did not give any bill of particulars in five days, and the situation stretched along until a week from the following Friday. Then they served us—or Thursday, I think it was—they served us with a notice for taking deposition in Clarksburg, West Virginia, on Saturday, and I told them that I would not attend unless your

Honor directed me to do it, but that I would attend before you to obtain your instructions on the subject. We then came up before you the next day at two o'clock, and after some further talk your Honor directed that they should bring witnesses here and that we should have the bill of particulars by Saturday. Saturday came and went and we had no bill of particulars, and then we came on to Monday, and again we had a pow-wow here, and again your Honor made a direction about the bill of particulars, this time that we were to get it by two o'clock on Monday, and we did not get it until after five o'clock of that day.

707

Now, that is a correct recital of what has taken place.

The Court: What do they say about this claim in their petition? This is an intervening petition, isn't it?

708

Mr. Hickox: No, sir, this is the original petition, and the claim on which they rely is an allegation in the petition that there were goods sold and delivered by the Pittsburg people to the Diamond Fuel Company. The proof which they talk about giving now in their bill of particulars, is not for goods sold and delivered at all; it is an attempt to claim—whether they will be able to prove it or not, I don't know—that goods sent by mistake on the permit of the Diamond Fuel Company got into the possession of this company, and they say were used by them, and consequently they now have a claim which I presume will be in the nature of a quasi-contract to recover for the value of the property.

The Court: Well, it is not in the nature of a quasi-contract, but I guess if they can prove it, if they can establish the proper relations between the parties, that would go to show they were delivered, and if they got the stuff and they accepted it and it was known to the parties finally, and they ratified the transaction, I should call it sold.

Mr. McNeill: That is our case, exactly, your Honor.

The Court: You had better put in your testimony on that. Let me ask this: Was there any dispute here about these other claims?

710

Mr. McNeill: If your Honor pleases, the Treasurer stated in his testimony that those were undisputed claims. Of course, our contention is that being undisputed claims and having become intervenors, they would cure any defect by reason of the failure to prove this claim. But your Honor seemed to be in doubt about that at the former hearing, so we undertook to prove this claim, and we are prepared to go ahead on that. If your Honor please, there are three petitioning creditors, two of whom are admitted to have provable claims, having existing claims, and one of the three being disputed; there are two intervening creditors whose claims are also admitted to be verities. Therefore we have four claims. The intervening claims were not put in at the time of the original petition but some time thereafter.

711

Mr. Barrett: We will call Mr. Yerkes, your Honor.

Mr. Hickox: Your Honor, I make the formal objection to any attempt on the part of the

712 *Testimony of Gardner Yerkes—Recalled—Direct.*

petitioning creditors here to prove such a claim set forth in the bill of particulars, as being contrary to the claim and issue set up in the original petition.

The Court: Overruled.

Mr. Hickox: Exception.

713 GARDNER YERKES, recalled^e by the Petitioning Creditors:

Direct Examination by Mr. McNeill:

Q. Mr. Yerkes, you have been sworn and examined in this case before? A. Yes, sir.

Q. You made it appear that you were Treasurer of the Diamond Fuel Company? A. Yes, sir.

Q. That you held that position up to the time of the receivership? A. Yes, sir.

714 Q. I wish to show you for identification a letter of the Diamond Fuel Company to Mr. M. Stires, of date December 20, 1920, and ask you if that is the genuine letter of that company, and by whom it is signed? A. It is signed by Miss Geruldsen.

Mr. Hickox: What did he say?

The Court: By Mr. Geruldsen?

The Witness: Signed by Miss Geruldsen. She kept the coal accounts.

Testimony of Gardner Yerkes—Recalled—Direct. 715

Q. I ask you to look at the exhibit attached, which appears to be a copy of a letter to the Pittsburgh & West Virginia Coal Company under date of December 18, 1920, addressed from the New York office of the Diamond Fuel Company to the Pittsburgh & West Virginia Coal Company, 28 American Building, Fairmont, West Virginia, and I ask you if you can state whether that is a genuine copy of a letter of that date (handing witness)? A. Well, I cannot say that it is a copy of—it is purported to be a copy of the letter.

Q. Does it purport to be attached? A. Oh, yes, it purports to be attached. 716

Q. To the other letter which I referred to, of December 20, 1920? A. And down here it is dictated by Mr. Watson.

Q. A. R. W.—who does that indicate? A. Alex R. Watson.

Q. What was his position with the company? A. Vice-President and General Manager.

Q. What is the initial "M. G." next to his signature—what does that indicate? A. That is Miss Geruldsen.

Q. The same lady who signed the former letter? A. Yes, sir. 717

Mr. Hickox: I object to this as immaterial, your Honor.

The Court: I do not know what it is. You will have to tell me what it is.

Mr. McNeill: I will pass it to your Honor.

The Court: You had better read it.

718 *Testimony of Gardner Yerkes—Recalled—Direct.*

Mr. McNeill: It is a letter of December 20th, if your Honor pleases, addressed to Mr. Stires, attorney for the Pittsburgh & West Virginia Coal Company.

The Court: December of what year?

Mr. McNeill: 1920. "In compliance with the request of Mr. Barrett"—

The Court: Who is Mr. Barrett?

Mr. McNeill: Attorney for the Coal Company.

719

The Court: Were you an officer of the company?

Mr. Barrett: Yes, sir, I was Vice-President for a time of this company and counsel also.

The Court: All right, this is a letter to Mr. Barrett.

Mr. McNeill: To Mr. Stires, who is on my right, counsel for the Pittsburgh & West Virginia Coal Company at that time, in an effort to collect this claim, addressed from the company to Mr. Stires at his New York office, reading as follows—

720

The Court: Let me ask first, when are you going to prove, if you have proof of it, the coal received?

Mr. McNeill: We will prove it by Mr. Cochran, sitting on my left.

The Court: What date was it? I want to know the relation in time with reference to this letter.

Mr. McNeill: It was some time prior to the date of this letter.

Testimony of Gardner Yerkes—Recalled—Direct. 721

Mr. Barrett: It was shipped on the 30th day of October, 1920, if your Honor pleases and about nine days thereafter received at the coal piers at Curtis Bay near Baltimore.

The Court: So this is about seven or eight weeks?

Mr. Barrett: The date of shipment it just happens is identical with the date that the attachment was sued out.

The Court: I mean this letter was seven or eight weeks after the coal was received? 722

Mr. McNeill: Right, your Honor. "In compliance with the request of Mr. Barrett we are enclosing herewith copy of letter which we sent to the Pittsburgh & West Virginia Coal Company, Fairmont, West Virginia, on December 18th." It is signed "Diamond Fuel Company, by M. Gerulsen." No official title is given, but has been identified, as your Honor knows, as the coal manager of the office. The letter attached, dated December 18th, is addressed to the Pittsburgh & West Virginia Coal Company, 28 American Building, Fairmont, West Virginia: 723

"Gentlemen:—Referring to the coal which you state you shipped for our account to the Tidewater Coal Exchange, Inc., this is to advise you that all of the cars 33 have arrived, but as this coal was not shipped on our orders you will have

724 *Testimony of Gardner Yerkes—Recalled—Direct.*

to look to the party you sold the coal to for payment. You will understand our position in this matter, as the market broke severely at that time and as we did not purchase the coal at all, it certainly is not up to us to make settlement, but the parties to whom you sold it. We are sorry this has occurred, but I think you will agree that we have a right to protect ourselves in this matter.

“Yours very truly,

725

“DIAMOND FUEL COMPANY,
By _____,
General Manager.”

Mr. Hickox: If your Honor please, the object of course in offering this letter is to attempt to show that the Diamond Fuel Company received coal. I submit that this letter is no proof of the fact.

Mr. McNeill: We expect to follow this up.

726

Mr. Hickox: Just a moment please. This letter is no proof of the fact that the Diamond Fuel Company ever got any coal from the Pittsburgh & West Virginia Coal Company.

Mr. McNeill: Now, we expect to follow up that proof with this, your Honor—that immediately following the receipt of this letter, not once but many times the Vice-President and Attorney for this Com-

Testimony of Gardner Yerkes—Recalled—Direct. 727

pany appeared in New York at the company's office and discussed this letter and discussed the whole proposition.

The Court: Discussed it with whom?

Mr. McNeill: With the then manager of this company, Mr. Watson.

The Court: What company?

Mr. McNeill: The Diamond Fuel Company. He thereupon heard him admit that time and time again that the coal has been received, that they had gotten the credit of it, that it had been sold for their benefit, that he was willing to pay for it if they would take five dollars a ton instead of nine. There cannot be any doubt but what this being a part of the general negotiations for a settlement and payment, this is relevant to the issue. 728

The Court: Then of course you do not rely on any contract price here?

Mr. McNeill: We relied upon a price that we made to Moore & Company, the market price as of that date, but not on the agreed market price made beforehand, before shipment. 729

Mr. Hickox: This does not connect up with any price to Moore & Company.

The Court: No, I see that it does not. But it does appear to involve an admission by the alleged bankrupt here that he received this coal.

Mr. Hickox: But that is not binding on us.

The Court: Why not?

730 *Testimony of Gardner Yerkes—Recalled—Direct.*

Mr. Hickox: Because we are entitled to have full proof of every question raised in issue here.

The Court: I do not think there is any doctrine by which the—I do not think you are so independent of the bankrupt as all that. You are trying to invoke different rules of evidence because you are a third party and trying to claim this is hearsay are you not?

731

Mr. Hickox: I am.

The Court: I do not believe that that is so. I am going to rule against you on that.

Mr. Hickox: I think we are entitled to strict proof of whatever allegations they made as necessary to sustain their position, and that we cannot be bound by a statement contained in a letter written by the Diamond Fuel Company some time after the event in question. Because, obviously, it is the sort of thing which they might not know anything about at all.

732

The Court: I should think they would know about it if anybody did. Your point about hearsay evidence is a new one to me. May be it is right, I don't know. Is there any law on that subject?

Mr. Hickox: And here we have, if your Honor pleases, the very witness on the stand—

The Court: Of course, if this was not a bankruptcy case, if this was the ordinary

Testimony of Gardner Yerkes—Recalled—Direct. 733

case, the creditor here does not stand in the position of the bankrupt, doing what the bankrupt would do if he did his duty. There are some things which the bankrupt does which surely are not binding on the creditors. His consent to an adjudication, for instance, is not binding; there are a good many things that he does which are not binding. Are his admissions made before the bankruptcy began binding? I should not say so. I am going to take a chance on that.

734

Mr. Hickox: But here is the treasurer of the company who has already testified that so far as he knows this concern is not a creditor of the company.

The Court: According to the books.

Mr. Hickox: According to the books.

The Court: That is true.

Mr. Hickox: Now here you have something written by somebody in the office, which purports to show that certain cars which the Pittsburgh Company claims to have shipped arrived. Arrived where? Baltimore is the place they are dealing with.

735

The Court: What difference does it make where they arrived?

Mr. Hickox: The Diamond Fuel Company has not any office in Baltimore. The writer of this letter cannot know whether these cars of coal which are supposed to have started from somewhere have arrived at some other point. He cannot by

736 *Testimony of Gardner Yerkes—Recalled—Direct.*

writing a letter make an admission on that which would be binding on us.

The Court: What other reference have you besides this letter?

737

Mr. McNeill: If your Honor pleases, we have the list from the mine that shipped the coal, indicating all of the cars; we have the B. & O. waybills showing the delivery of the cars, and we have the fact that this very fund is now in the hands of the United States Court in the City of Baltimore, growing out of the sale by the Port Officer of the Diamond Fuel Company, which general fund this company is trying to hold away from the general creditors. We have the evidence of Mr. Barrett, the vice-president, that they agreed they had received it, had obtained the benefit of it, and were willing to pay for it if we took half the price asked. We have the letters from the B. & O. Railroad reciting the shipment of cars to the Diamond Fuel Company.

738

The Court: Of course, Mr. Barrett's statement is a poor order of proof, at any rate, because how did Mr. Barrett know anything about this coal or where it came from?

Mr. McNeill: Mr. Barrett knew because he attended to the shipment of it, if your Honor pleases.

The Court: Attended to the shipment?

Mr. McNeill: As an officer of the company. He was in Fairmont. He was in Fairmont, West Virginia, and directed it

Testimony of Gardner Yerkes—Recalled—Direct. 739

to them, made the contract, and saw they shipped it.

Mr. Barrett: The matter seems to be getting confused here at the bar of the Court, and I think it ought to be cleared up by this statement: This coal was purchased by the Pittsburgh & West Virginia Coal Company from the Long Coal Company and delivered at the Curtis Bay piers at Baltimore.

The Court: How are you going to prove that? 740

Mr. Barrett: We have abundant proof of it here and we will put it in as it goes along.

The Court: I do not think your statements about it are a very good kind of proof. You never saw the coal in Baltimore and knew nothing about it except by hearsay.

Mr. Barrett: Your Honor, we are taking it for granted that the very best evidence of goods sold and delivered is the admission of the company to which they were delivered and transferred by the consignor. 741

The Court: Yes, but one of the admissions is an admission by yourself, and you do not know anything about it except by your statement, which is hearsay.

Mr. Barrett: I do know about it, but unfortunately I am placed in what might be called or looked upon as a very unethical position, of attorney and witness here, a

742 *Testimony of Gardner Yerkes—Recalled—Direct.***743**

position which I do not at all enjoy, I assure you; but at the same time it happened that the office of this Pittsburgh & West Virginia Coal Company of which I was a stockholder and at one time one of the attorneys was adjoining my office in West Virginia and I was frequently called in to approve transactions going on through the office, and I was there when this order was received from Moore & Company, and I knew this was received. None of us knew this overshipment of coal by Long & Company was made until after it was completed.

The Court: I do not doubt your familiarity with the situation in a general way, but what I am pointing out is you did not know of the overshipment and do not know of the arrival of the coal personally, and nothing about it except by what you have seen by reading records.

744

Mr. Barrett: I do know about it by reason of the fact that I went to the Tidewater Exchange and found it was credited by the Tidewater Coal Exchange and had been delivered to them; I know of it from interviews with the Baltimore & Ohio Railroad, by letter which they have written to us, which gives the date of delivery and everything, when it passed the railroad scales, when it reached the Curtis Bay piers. The proof, your Honor, is overwhelming and complete. I would like in addition to what I have said just now

Testimony of Gardner Yerkes—Recalled—Direct. 745

to call to the Court's attention one decision of the Court which I think settles our position here before the Court; that is, if in the last analysis the Court is impressed with the fact that this may possibly be an unliquidated claim, if so then we have a perfect right to use it as one of the petitioning creditors at the time it was prepared and filed. We have a right under the bankruptcy act itself, by the provisions of the law which describe the method by which claims may be liquidated, to apply to the Court and ask to have this claim liquidated and proved, that its prima facie claim on its face is supported not only by our testimony but the absolute unanimous opinion of practically all of the Courts.

746

There are just one or two little cases here I would like to call your Honor's attention to. As to the claim of the Pittsburgh & West Virginia Coal Company, let us take the most extreme view that could be taken of that debt and call it an unliquidated claim. If we do this, although unliquidated it is still proved, and while in the last analysis the petitioner may not be able to recover in this proceeding the full amount which it claims, yet at the same time it would be entitled to receive payment of some amount for goods and property which it actually transferred to the defendant corporation, which was accepted and used by it.

747

748 *Testimony of Gardner Yerkes—Recalled—Direct.*

The Court: I am assuming all that for the purposes of this trial. What I want to be sure of is that you get the proper proof of the delivery. If you have all the Baltimore & Ohio records and can trace this right through here and can show it to them, I think they ought to admit the fact. There is no sense of litigating such a thing and taking depositions about it if it is as plain as all that.

749

Mr. Barrett: It is exactly as plain as all that and it is supported by the evidence, by the weight of authority, and we have the right under the Bankruptcy Act to prove this claim.

Mr. Hickox: If your Honor please, this counsel and witness weeks ago testified as follows:

750

"The Witness: Prior to October 29th the Pittsburgh & West Virginia Coal Company received from the Diamond Fuel Company an order for 29 carloads of coal." Mind you, this is Mr. Barrett testifying.

The Court: Does the 29 include this?

Mr. Hickox: Yes. "I object."

Mr. Barrett: May I interrupt you. I want the papers brought into the Court.

Mr. Hickox: I have the stenographer's minutes here.

Mr. Barrett: I mean the original papers, all the original file which is filed in Court here.

Mr. Hickox: The Court then said: "Ob-

*Testimony of Gardner Yerkes—Recalled—
—Direct.*

751

jection sustained. It was in writing, was it not?

"The Witness: Yes."

Then we get a bill of particulars entirely at variance with this witness' sworn statement, and now we get another statement from this witness at variance with his bill of particulars; and yet the man talks about there being an overwhelming weight of proof to establish what he says. Why, the longer we have discussions on the subject the more we get varieties of what the transaction is supposed to have been.

752

The Court: I know, but he says he has a lot of records here now.

Mr. Hickox: I will admit nothing.

The Court: What?

Mr. Hickox: I will admit nothing that he produces here to me. I will require him to prove whatever he thinks he can prove.

753

Mr. Barrett: If your Honor please counsel goes far beyond what he should expect in a proceeding of this kind. We are only here to make out a prima facie case and not here to establish this claim beyond all question. That will come at another time.

The Court: Oh, no, you are not required to prove it beyond all question, but you have to present proper proof and how are you going to show it?

Mr. McNeill: In keeping withh your Honor's suggestion, I tender to counsel a letter from the Baltimore & Ohio Rail-

754 *Testimony of Gardner Yerkes—Recalled—
Direct.*

road, bearing date December 20th, 1920, showing officially shipments of all these cars of coal to the Diamond Fuel Company, Pool 34, Curtis Bay, Baltimore, Maryland. I also tender to them bills showing the shipment of these different cars by the Long Coal Company, shipped to the Pittsburgh & West Virginia Coal Company, on order, to be shipped to the Diamond Fuel Company, Curtis Bay, Maryland, the same cars of coal which we expected to in course offer—

755

The Court: The same cars?

Mr. Barrett: The same identical car numbers. You will understand what Mr. McNeill intends to bring to the attention of the Court—that it is the same coal.

The Court: How do you know this was the Pittsburgh & West Virginia coal?

Mr. Barrett: The car numbers check up from the time they leave the mines until they are received.

756

The Court: That they came from your mines?

Mr. Barrett: They came from the mines of the company which we purchased the coal from, your Honor.

The Court: I know that you purchased the coal from those mines, but how are you going to prove that from this Long Coal Company?

Mr. Barrett: We have the invoices of J. E. Long Coal Company to us for the same identical cars.

*Testimony of Gardner Yerkes—Recalled—
Direct.*

757

Mr. McNeill: We are going to prove that we paid for it, if your Honor please.

Mr. Barrett: Not only that, we are going to prove that we paid for it and we have not received one cent either for the 15 cars or the 18 overshipped. We have had nothing but expense and camouflage in the matter from the time that it started to the present day.

The Court: You say those things are so. How are you going to prove the purchase, how are you going to prove this was Pittsburgh & West Virginia coal?

758

Mr. Barrett: We will ask your Honor to admit the invoice of the J. E. Long Coal Company which is the original to the Pittsburgh & West Virginia Coal Co. We will ask your Honor to admit the copy of the invoice of the Pittsburgh & West Virginia Coal Company to the Diamond Fuel Company. We will ask your Honor to admit the original ledger sheet on which this was charged to the Pittsburgh & West Virginia Coal Company, and we will ask your Honor to admit the car record from the office of the Pittsburgh & West Virginia Coal Company, on which the record of this shipment was made, the date it was made, and all this we will prove as original records by an officer of the company who is here brought to testify, for that purpose.

759

The Court: Of which company?

Mr. Barrett: Of the Pittsburgh & West Virginia Coal Company, who has these

760 *Testimony of Gardner Yerkes—Recalled—
Cross.*

761 now in his custody, William H. Cochrane, of Pittsburgh—here for that purpose. We will identify all these records as original records. There is not any man engaged in the profession of the law in West Virginia that goes to the mine and sees the coal shipped; we have to get our information through the ordinary and the usual channels and from the records kept of the transaction. These records we have with us and want to tender, and we ask your Honor to admit them.

The Court: I will overrule your objection and admit this letter, in the first place.

Mr. Hickox: Is this being marked, your Honor, or is it not? Is it marked in evidence or is it not?

The Court: I supposed it was offered in evidence.

Mr. Hickox: I supposed so.

762 Mr. Barrett: We would like to have it marked and offered in evidence in this case.

Marked Petitioning Creditors' Exhibit No. 5.

Cross Examination by Mr. Hickox:

Q. Mr. Yerkes, did the Diamond Fuel Company have any office in Baltimore? A. No, sir, they did not have an office in Baltimore.

Q. And the letter that has just been referred

*Testimony of Gardner Yerkes—Recalled—
Re-direct.*

763

to had certain initials on it, I believe you said J. G. C.? A. M. G.

Q. And what do those stand for, do you think?

A. They stand for Geruldsen. Geruldsen was a clerk in our office, New York office, who kept the coal records.

Q. Was Gerulsen your stenographer? A. No, she was not a stenographer but she did work on a machine. She could do stenography, though, but her—

Q. You mean she kept a note? A. She kept the complete records.

764

Q. A note of such information as came in to you, with respect to your coal transactions? A. Yes, sir.

Q. And none of those matters about which she kept a note were within her own knowledge, were they? A. Well, she had to go by the records as they came from Baltimore.

Q. Nothing that she knew about herself? A. She was not on the ground and handled the coal, no.

765

Re-direct Examination by Mr. Stires:

Q. Mr. Yerkes, you were asked whether you have an office in Baltimore and you answered no, I believe. You just state that her information came from records which she received from Baltimore. From whom did she receive those records in Baltimore? A. Tidewater Coal Exchange.

Q. The Tidewater Coal Exchange is an organization to handle the coal of the various members in that exchange? A. Yes, sir.

766 *Testimony of Gardner Yerkes—Recalled—
Re-direct.*

Q. And is in effect the agent of the members; is that correct? A. Yes, the members are all—

Mr. Hickox: I object, your Honor, to what conclusion this witness may draw at the suggestion of counsel.

The Court: Read me the question.

(Question read.)

Yes, I will sustain the objection.

767 Q. Was the Diamond Fuel Company a member of the Tidewater Coal Exchange? A. Yes, sir.

Q. And as such member it received coal at the Tidewater Coal Exchange; is that correct? A. Yes, sir.

Q. And as that coal was received by the Tidewater Coal Exchange for the credit of the Diamond Fuel Company advice was sent by the Tidewater Coal Exchange to its various members, including the Diamond Fuel Company?

768 Mr. Hickox: I object to this, your Honor, for another reason. I have had occasion to go through some time ago in trials before Judge Rose in Baltimore this matter very thoroughly, and the testimony developed from the officials of the Tidewater Coal Exchange shows that that is not the way in which the matter is carried on at all, and I suggest that this witness is not a competent witness to attempt to say what the members are by which the Tidewater Coal Exchange does business.

Testimony of Gardner Yerkes—Recalled — 769
Re-direct.

The Court: Well, I think if he is asked the questions he should be asked general questions, not led in that way. You are telling him just what you want him to say.

Mr. Stires: I withdraw that question, but I think that is just as competent as the evidence that the learned counsel is attempting to give by what transpired in Baltimore.

Mr. Hickox: I am attempting to make an objection. 770

Q. Do you know, Mr. Yerkes, whether members of the Tidewater Coal Exchange received advice from the Tidewater Coal Exchange of coal as it was delivered for the account of the various members? A. I do.

Mr. Hickox: I object. The witness can do no more than say whether this company ever received something from the Tidewater Coal Exchange. He cannot speak as to what happened to other parties.

The Court: Overruled. 771

Mr. Hickox: Exception.

Mr. Stires: Answer the question, Mr. Yerkes.

The Court: He said "I do."

Q. So referring to this Exhibit just offered, in which the statement is made that all of the 33

772 *Testimony of Gardner Yerkes—Recalled—
Re-direct.*

cars have arrived, this information came from the Tidewater Coal Exchange?

Mr. Hickox: I object.

Q. How would you have ordinarily gotten that information? A. Why, the only information our office could get would be from the Tidewater Coal Exchange.

773 Q. Do you know in this particular case how you got that information from the Tidewater Coal Exchange?

Mr. Hickox: I object, the witness has not testified that he got this particular information from the Tidewater Coal Exchange.

The Court: Overruled. He may answer.

A. What is the question again?

The Court: Do you know how you got it from the Tidewater Coal Exchange.

774 The Witness: I cannot say how Miss Geruldsen got that particular information any more than the general information; all the information we have about coal going to the Baltimore piers, came from the Tidewater Coal Exchange, of which we were members.

Q. And that was your regular custom, was it not, Mr. Yerkes? A. Yes, sir.

Testimony of Manning Stires—Direct.

775

Mr. Stires: That is all.

Mr. Hickox: I object. There is no proof whatever binding us with respect to a statement written by Miss Geruldsen.

The Court: I will overrule your objection for the present.

Mr. McNeil: If your Honor pleases, we will call Mr. Stires to the stand for a moment. Would you object to this, Mr. Hickox, without proof (handing evidence paper)?

776

Mr. Hickox: We will.

MANNING STIRES, called as a witness on behalf of the petitioning creditors, being duly sworn, testified as follows:

Direct Examination by Mr. McNeill:

Q. Mr. Stires, you are a member of the bar of this city? A. I am.

777

Q. As such did you have in hand during December, 1920, the matter of collecting an alleged claim of the Pittsburgh & West Virginia Coal Company for coal delivered, or alleged to have been delivered to the Diamond Fuel Company? A. I have.

Q. As such did you have any correspondence with the said company, Diamond Fuel Company, or telephone conversation? A. Both.

778

Testimony of Manning Stires—Direct.

Q. As such did you also have correspondence with the Baltimore & Ohio Railroad Company?

A. Yes, sir.

779

Q. I show you first for identification a letter addressed to your firm, Stires & Barron, 220 West 42nd Street, New York, signed by G. J. Malone, under which is the letter "M" on the stationery of the Baltimore & Ohio Railroad Company, Transportation Department, at Baltimore, attached to which are two mailgrams as they are marked under date of December 16th and December 17th, purporting to show a list of cars of coal shipped and received by the Baltimore & Ohio Railroad, consigned to the Diamond Fuel Company, Pool 34, Curtis Bay, Maryland. I ask you if you in due course received that letter (handing witness)? A. I received this letter in reply to a letter of mine asking where the coal was delivered and to whom.

Q. This came by mail to your office? A. Yes.

Mr. McNeill: I offer this in evidence.

Mr. Hickox: I object to it.

780

The Court: Overruled.

Mr. Hickox: Exception.

Marked Petitioning Creditors' Exhibit No. 6.

Q. You said a moment ago in answer to a question that you have had certain correspondence as to this matter. I have identified already as Exhibit 5, already admitted in evidence, what appears to be a letter addressed to you. Is that

in answer to one of the letters that you wrote this company (handing witness)? A. I don't know as it was, sir. This says it was sent to me at the request of Mr. Barrett. A pretty long while ago, and I cannot see whether this was in response to a letter. I had some conversation with the office on the subject.

Q. Can you state whether you have your correspondence back and forth with this company?

A. Some of it. Some I have loaned out.

Q. Have you any of it with you with respect to the— A. None whatever; no, sir.

782

Q. With respect to the delivery of the coal?

A. No, sir.

Q. Have you any of it in your possession that is informing on this subject? A. I think I have nothing left. I gave some to Mr. Preston in West Virginia and some to Mr. Barrett, and I think I have nothing but carbon copies of my letters.

Q. Have you endeavored to find what you did have in your office? A. I have.

Q. So far as you know is it lost or misplaced? A. I think it is not lost. I think it has all been loaned out to someone who has failed to return it. I find that the original records, the original orders, were in my possession and were given to Mr. Preston, an attorney in West Virginia, who tried to get a settlement with Mr. Watson after Mr. Watson left New York and returned to West Virginia.

783

Mr. Hickox: I object, if your Honor please, to testimony as to what Mr. Preston did.

794

Testimony of Manning Stires—Direct.

Mr. McNeill: I will not press that, Mr. Hickox.

Q. You stated you had certain conversations with the Diamond Fuel Company. With whom did you talk and when, on this subject? A. I talked with Mr. Watson, who was the Vice-President, some time in the early part of December.

The Court: 1920?

The Witness: 1920.

785

Q. Will you state the substance of that conversation as you remember it, relating to this coal? A. The first part he denied any knowledge whether the coal had actually been received by the Diamond Fuel Company and told us to look to Long & Company for payment.

Mr. Barrett: You mean Moore & Company?

The Witness: Moore & Company—for payment. I had some correspondence with Moore & Company and they quite frankly disclaimed any liability.

786

Mr. Hickox: If your Honor please, here is what purports to be the subject of a conversation with Moore & Company.

The Witness: Pardon me, a lawyer makes a poor witness.

Mr. McNeill: We will not ask that that go in.

The Witness: I am not trying to put anything in.

Testimony of Manning Stires—Direct.

787

Q. Continue with the conversation with Mr. Watson.

The Court: You do not object to that, do you?

Mr. Hickox: I do not want to be met later on by the suggestion that anything can go in, although a good deal seems to be going in now.

The Court: I do not think anybody will accuse you of consenting to it.

A. Mr. Watson finally said that he had found out that the coal had been received by the Diamond Fuel Company at Curtis Bay and wanted to make an adjustment. The price that the other cars had been sold at was nine dollars, and he stated at one time they would pay five dollars. I was authorized to accept eight dollars, and we never got together. Then Mr. Watson went back to West Virginia.

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Q. Will you state whether or not Mr. Watson gave you any information as to what had become of the coal in Baltimore? A. No, I did not learn until afterwards, sir.

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Q. How did you learn afterwards, through him? A. No, through the records of Baltimore.

Q. Was that the substance of conversations you had with Mr. Watson? A. Yes, sir.

Q. Now, you referred to the records in Baltimore. Have you made a personal investigation in Baltimore of this matter and examined the records of the Tidewater Coal Exchange? A. No, sir, I tried to and they refused to give me any information.

790

Testimony of Manning Stires—Direct.

Q. What records did you refer to? A. The Baltimore & Ohio and the Court records in that attachment suit.

Q. That would not be proper here. Did you have any other conversation with any other officer of the Diamond Fuel Company on this subject? A. Yes, I have talked to Col. Bope, who was President, and I have talked to Mr. Yerkes at various times since the bankruptcy.

791

Q. Did those conversations amount to something different than that with Mr. Watson, or did they amount to substantially the same thing, and if the same I will not ask what they were?

Mr. Hickox: I suggest that he should testify to the conversation and say what they were.

The Court: Yes, objection sustained.

Mr. McNeill: Counsel is right about that.

Q. Can you state the substance of those conversations, or either of them? A. Yes.

792

The Court: Who were the conversations with?

The Witness: Colonel Bope, the president of this company.

The Court: Of the Pittsburgh?

The Witness: No, of the Diamond Fuel Company, and Mr. Yerkes, the treasurer.

Q. What was the substance of those conversations, as you remember? A. Both were to the effect that they did not know that the coal had

Testimony of Manning Stires—Cross.

793

been ordered, that Mr. Watson had done the ordering and they did not know that the Pittsburgh & West Virginia was a creditor, until after the bankruptcy petition had been filed, and they found they had shipped this coal.

Q. Did they state whether or not they then knew that the coal had been received and had gone to their credit in Baltimore? A. No, I would not say they made any specific statement. I did not ask them any specific question.

Cross Examination by Mr. Hickox:

794

Q. Did they say to you that Mr. Watson had ordered the coal? A. (No response.)

Q. You just testified so. A. Yes, I think they did. It was the form of your question, sir, that caused me to consider.

Q. I want to be definite as to what your recollection is on the subject. A. Well, they rather thought that Mr. Watson had ordered a great many things they did not know about. That is the thought they gave me.

Q. Well, do you or don't you say that they claimed Mr. Watson had ordered this coal? A. Yes, they claimed Mr. Watson ordered it—not directly from the Pittsburgh & West Virginia, you understand, but through another broker.

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The Court: Who was the other broker?

The Witness: This Moore & Company in Philadelphia.

The Court: Well, there you are. You have a damaging statement in there now of your witness.

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Testimony of Manning Stires—Cross.

Mr. Barrett: Well, the witness evidently refers to the 15 cars.

The Court: I don't know, he evidently does not on the face of it.

Mr. Barrett: We will give him an opportunity to explain his testimony, of course.

The Court: All right.

797

Mr. Barrett: What coal did that relate to, Mr. Stires; did they say it was the original order that went to Moore & Company or the amount that had been shipped by mistake, the 18 cars.

The Witness: Well, when they referred to orders they were referring to orders which were for specific quantities of coal. My conversations were not as specific as to go into the particular cars in question.

Q. No, but you were dealing in your conversation with the coal with respect to which the Pittsburgh & West Virginia Coal Company is making claim here, were you not? A. No, we were talking generalities.

Q. Well, now, Mr. Stires, didn't you go to try and collect a claim; isn't that what you said? A. Oh, but this was after the bankruptcy, sir. These conversations are all after the petition in bankruptcy was filed, and during or after some examinations I had as attorney for the receiver.

Q. Yes, but you were asked on direct examination about this conversation of the Pittsburgh

Testimony of Manning Stires—Cross.

799

& West Virginia Coal Company, were you not?

A. Yes.

Q. You said you had a conversation with Col. Bope and Mr. Stires: A. With Mr. Yerkes.

Q. Excuse me, Mr. Yerkes, and that they told you Mr. Watson had ordered this coal; didn't you say so? A. Yes, that is correct, I said that. But when I am speaking of his order, I am referred to his order, and his order was for 15 cars, not for 33.

Mr. McNeill: We are going to put these orders in.

800

A. I understood that they were only asking to establish the claim for 18 cars.

Q. The first suggestion we have here of any differentiation in your testimony is when Mr. Barrett suggested to you a question of difference. A. I do not like to be put in that position, Mr. Hickox.

Q. Well, isn't it quite true? A. No, I don't think that is fair. I really don't.

Q. That throughout your direct examination, and until Mr. Barrett made his suggestion, you had never suggested to us that you were dealing with anything else but this order for this coal, which was supposed to have been shipped by the Pittsburgh & West Virginia Coal Company? A. The thought I am trying to make is—

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Testimony of Manning Stires—Cross.

The Court: You are using vague terms, that is the trouble. Whether you mean the excess amount or the 33 car loads or what you mean.

Mr. Hickox: Well, the coal which he says was ordered by Mr. Watson.

803

The Witness: Well, the way I understand it, the way I understand our conversations, if Mr. Watson had not ordered the original 15 cars there would not have been any question of these 18 cars raised now, because there would not have been anything shipped at all. So that when they referred to Mr. Watson having ordered the coal I understood them to mean—I think it is only fair that we all should understand they were referring to the order for the 15 cars and that these 18 cars flowed along as a consequence.

804

Q. Then we have it quite definite, have we, from you, that Colonel Bope and Mr. Yerkes said that Mr. Watson had ordered from Moore & Company in Philadelphia some— A. Some coal, correct.

Q. Some coal in which or in connection with which, his claim against the Pittsburgh & West Virginia Coal Company was made? A. As a result of which.

Q. As a result of which yes. A. That is correct.

Testimony of Manning Stires—Cross.

805

Mr. McNeill: I would like to have Mr. Stires go back to the discussion when there was an adjustment proposed.

The Court: That, of course, is extremely important, because it makes all the difference in the world if you are going to let in an admission—and it is a tenuous kind of evidence in a case like this, anyhow—as to what the foundation of the admission was; in other words, whether they were making this admission upon the hypothesis that they thought the liability followed as some conclusion of law, or whether they meant to say that they had the coal. That last admission would show a contract between the Pittsburgh & West Virginia Coal Company and Moore & Co., and would be an admission of nothing, and would throw you right out of Court.

806

Mr. McNeill: We are prepared to discuss that with Your Honor.

Mr. Barrett: The position that we want to take in that matter, and which we have already taken is that there was an original order for fifteen cars of coal made by Moore & Co., and while the shipping company was executing that order, by mistake it shipped eighteen cars more.

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The Court: What does he know about that?

Mr. Barrett: He knows from admissions of an officer of the company, Mr. Watson, that these eighteen cars of coal were actually shipped by mistake, and that they received it, and in conversation with

808

Testimony of Manning Stires—Cross.

Mr. Stires he offered \$5 a ton, which he stated was a fair price for the coal at that time, thus making completely the case which we are undertaking to make, even without any further testimony. If that was a fair price at that time—and Mr. Watson stated it was a fair price—it certainly established the fact that they received the coal and were willing to pay for it.

809

The Court: All right, go ahead.

Mr. Barrett: What we want Mr. Stires to testify about is the eighteen cars of coal that were shipped by mistake. We know that there is nothing relevant here that can be put in, in reference to the fifteen cars of coal, except to illustrate what was going on.

The Court: I was merely pointing out that if there was confusion in the minds of the officers about what they were talking about, their admission amounts to nothing.

810

Mr. Barrett: Your Honor will probably recall the direct testimony of Mr. Yerkes, in which he said that Mr. Watson was the active officer of the company, in the purchase of coal. Naturally, what Col. Bope would know about it, and what Mr. Yerkes would know about it, would be what had been communicated to them.

The Court: So his testimony as to what they said does not amount to much.

Mr. Barrett: I do not think it does. I think the testimony of Mr. Watson that he

Testimony of Thomas F. Barrett—Recalled— 811
Direct.

offered to pay for the coal, and fixed the price, in his own judgment, as of that time, is conclusive.

By Mr. McNeill:

Q. Mr. Stires, to get clear on that question of the discussion of a settlement, will you state whether or not Mr. Watson, in offering \$5 per ton, stated to you whether or not that was a fair price for the coal at that time, in his opinion? A. Yes, he said the market had taken a sharp tumble. 812

Q. And as a result of that tumble, what did he say was a fair price for the coal at the time of your conversation with him? A. He said \$5 a ton.

Mr. McNeill: That is all.

The Court: Have you anything further to ask Mr. Hickox?

Mr. Hickox: No, Your Honor.

Mr. McNeill: Mr. Barrett, will you take the stand, please:

813

THOMAS F. BARRETT, recalled:

By Mr. McNeill:

Q. Mr. Barrett, you have identified yourself, on the stand formerly, as a member of the bar of West Virginia? A. Yes.

814 *Testimony of Thomas F. Barrett—Recalled—
Direct.*

Q. And former Vice-President of this company, have you not? A. I have, yes.

Q. And you testified heretofore as to some of the facts in this transaction, did you not? A. I did.

Q. Not having had the benefit of being present at that time, you will aid me in not duplicating your testimony. I do not care to cover anything that has already been covered. I wish to show you, Mr. Barrett, in the first instance, a paper which I will ask you to please state what it purports to be (handing paper to witness)? A. This one (indicating)?

Q. All of them—four papers attached together. A. Well, there is one here which is the original invoice received by the Pittsburgh & West Virginia Coal Company from J. E. Long Coal Company.

Q. Now, please state who is the J. E. Long Coal Company? A. The J. E. Long Coal Company is a coal company located in Clarksburg, West Virginia, engaged in the business of mining and shipping coal, and also engaged in the business of dealing in coal as a broker.

Q. How did you receive that paper—in what course? A. It was received in the office of the Pittsburgh & West Virginia Coal Company at the American Building in Fairmont, West Virginia, in the course of the transaction of its regular business.

Q. Did you testify in the former hearing whether or not you had bought from that company, representing the Pittsburgh & West Vir-

Testimony of Thomas F. Barrett—Recalled 817
Direct.

ginia Coal Company, certain coal for shipment, which is described on that paper? A. We had not reached that part of the testimony.

Q. Well, will you state whether or not prior to receiving that bill you had entered into an agreement with the Long Coal Company for the purchase of certain coal for shipment to Baltimore for the account of the Diamond Fuel Company?

A. I can only state that in this way—

Mr. Hickox (Interposing): I object, if 818
your Honor please. That is a perfectly simple question. We do not want a speech for an answer.

The Court: Objection sustained.

Q. Just state what the facts were with respect to your dealings with the Long Coal Company, as they related to the Diamond Fuel Company, and this shipment to the Diamond Fuel Company? A. The Pittsburgh & West Virginia Coal Company received, through Moore & Co. of Philadelphia, by telegraph and also by telephone, an order to ship a certain amount of coal up to twenty cars— 819

Mr. Hickox (Interposing): If Your Honor please, I object to any testimony as to what took place over the telephone, unless this witness says that he received the telephone message himself.

The Court: Yes, that is true.

The Witness: Well, I anticipated that. I meant to say that I was present—

820 *Testimony of Thomas F. Barrett—Recalled—
Direct.*

By Mr. McNeill:

Q. You were present? A. Yes.

Mr. McNeill: I offer in evidence the telegram purporting to be from Moore & Co., and ask this witness if he identifies it.

821 The Witness: I was in the office of the Pittsburgh & West Virginia Coal Company when the second telephone conversation took place between Moore & Co. and the—

Mr. Hickox (Interposing): One thing at a time, please.

The Court: Yes.

Q. Do you identify the telegram that I offer?

Mr. Hickox: I object to this telegram. There is no proof—

Mr. McNeill (Interposing): I am not offering it yet.

822 Q. I now ask you do you identify as the original a telegram of date October 20, 1920, addressed to the Pittsburgh & West Virginia Coal Company, Fairmont, signed Moore & Co., Inc. (handing paper to witness)? A. October 29th.

Q. October 29th? A. Yes, I do identify that as the original telegram received.

Mr. McNeill: I will submit this to counsel, of course (handing paper to Mr. Hickox).

Testimony of Thomas F. Barrett—Recalled— 823
Direct.

Mr. Hickox: I make the same objection, if Your Honor please.

The Court: Same ruling.

Mr. Hickox: Exception.

Mr. McNeill: I will tender them all to your Honor, and will ask the stenographer to mark them seriatum. The first telegram, dated October 29, 1920, reads as follows, addressed to the Pittsburgh & West Virginia Coal Company, Fairmont, West Virginia (reading). 824

The Court: I will mark them as you read them.

Mr. McNeill: Yes.

Paper marked Exhibit No. 7.

Mr. McNeill: In reply to that, on the same date, there was this telegram (reading).

The Witness: That should be "Account low car supply" instead of "lot car supply."

Mr. McNeill: Yes. 825

Paper marked Exhibit No. 8.

Mr. McNeill: Under date of October 30th, the following telegram from Moore & Co. (reading).

Paper marked Exhibit No. 9.

Mr. McNeill: Attached to that, Your Honor, is a confirming telegram, which is to the same effect.

Now, under date of October 30th, an answer to that telegram addressed to Moore & Co., signed Pittsburgh & West Virginia Coal Company (reading).

826 *Testimony of Thomas F. Barrett—Recalled—
Direct.*

Paper marked Exhibit No. 10.

Mr. McNeill: Following that, on October 30th, 1920, a telegram to the Pittsburg & West Virginia Coal Company, signed Moore & Co., confirming phone conversation (reading).

Paper marked Exhibit No. 11.

Q. Now, Mr. Barrett, can you state whether or not prior to the receipt of this telegram you had
827 had a telephone conversation with Moore & Co.?

A. We had, yes, sir.

Q. Can you state the substance of that conversation?

The Court: Did you have it?

The Witness: I had a part of it, Your Honor. I was on the wire a part of the time.

Q. State the part that you had?

Mr. Hickox: I object. I think he must first identify the people with whom he was talking—Moore & Co.—that he knew them and recognized their voices.
828

Q. Can you do that, Mr. Barrett? A. I went into my private office in connection with the coal company's suite, and took up the telephone, at the request of the sales manager, who handled the business. The conversation was then going on between the sales manager and Mr. Holt, of Moore & Co.—

Testimony of Thomas F. Barrett—Recalled— 829
Direct.

Mr. Hickox (Interposing): I object to this, if your Honor please.

Q. At least you understood that? A. You do not know that? A. I knew his voice and knew the man he was talking to.

Q. Did you know the voice of the man talking at the other end of the line?

The Court: He just said that he did.

The Witness: Yes.

830

Q. Who is Mr. Holt? A. Mr. Holt at that time had full charge of the office of Moore & Co. at Philadelphia.

Mr. Hickox: Please do not attempt to say that he had full charge of the office, sir.

The Court: No.

Mr. Hickox: I object to it, your Honor, as incompetent, irrelevant and immaterial.

The Court: I do not know. It may be brought out on cross examination.

831

Mr. Hickox: Very well.

Q. Do you know what were his duties in the office of Moore & Co.? A. I only know from experience in dealing with him as the active officer in the office, who transacted the business of the company.

Q. Had you had various dealings with that office before? A. The Pittsburgh & West Vir-

832 *Testimony of Thomas F. Barrett—Recalled—
Direct.*

ginia Coal Company with which I was connected had very large transactions with him, and I transacted a part of the business myself.

Q. Did you go to his office and see him personally about any of those matters? A. I did, very frequently.

Q. And you knew his voice, did you? A. Yes, very well.

833 Q. Now, what was the substance of the telephone conversation? A. The substance of the telephone conversation was that they wanted the Pittsburgh & West Virginia Coal Company to ship to the credit of the Diamond Fuel Company, or to consign, rather to the Diamond Fuel Company, under its government permit fifteen cars of coal, about which they must be advised by twelve o'clock the next day, October 30th. He emphasized the fact that they must be advised by twelve o'clock, and the reason that it was brought to my attention by the man who had charge of the office was to find out whether
834 they could accept the order, and I told him not to do it unless he was sure that the coal had already left the mine.

Q. Did you talk with Mr. Holt at that time? A. Only a few words.

Q. What was the substance of the talk that you had with him at that time? A. Just what I have stated, that we would not agree to accept the order firm until we were advised by the mines that the coal had left the mines. At that time there was quite a storm raging in the mining regions, and the telephone wires were

Testimony of Thomas F. Barrett—Recalled— 835
Direct.

loaded with business, and it was impossible to commit ourselves beyond that.

Q. State now when you learned that the coal had been shipped? A. I learned about two days after the shipment had been made that the fifteen cars had been shipped. We learned about two weeks later—

Mr. Hickox (Interposing): I object.

Mr. McNeill: I will withdraw the question. 836

Q. State whether or not the coal had been shipped to your knowledge prior to the receipt of the telegram which has been offered in evidence, cancelling the order (handing paper to witness)? A. No, we did not know anything about it at that time.

Mr. Hickox: I object.

The Witness: We did not receive that telegram until the next day on account of the storm.

The Court: You do not object to his saying that he does not know anything about it, I take it? 837

Mr. Hickox: No, I do not object to that.

Q. What I wanted to find out was whether or not at the time you received this telegram the coal had actually been shipped and billed to you? A. We knew that fifteen cars had been shipped. We did not know that the mistake of shipping eighteen additional cars had been made.

838 *Testimony of Thomas F. Barrett—Recalled—
Direct.*

Mr. Hickox: I object to his statement of fifteen cars had been shipped, unless this witness has personal knowledge of the fact that the coal had been shipped, or saw the coal on the way.

The Court: I will sustain your objection.

By Mr. McNeill:

839 Q. Mr. Barrett, you stated just awhile ago that you had had repeated conversations with Mr. Holt in the office of Moore & Co.? A. Yes, sir.

Q. Can you state whether or not they were buying agents for the Diamond Fuel Company? A. They were, yes, sir.

Mr. Hickox: I object to that.

Mr. McNeill: You do not admit that, Mr. Hickox.

Mr. Hickox: No.

840 The Court: Objection sustained. Strike it out.

Q. I will bring you, then, to New York, to the office of the Diamond Fuel Company: Did you ever have any conversation with them with respect to this shipment? A. I did.

Q. With whom? A. With Alexander R. Watson, who was then Vice-President of the company.

Testimony of Thomas F. Barrett—Recalled— 841
Direct.

Q. What was his position? A. He was Vice-President, and seemed to be the active officer in charge of its business.

Q. How soon after these shipments were made to Baltimore did you see Mr. Watson? A. To the best of my recollection, it was about three weeks, perhaps more. I should say about the middle of December, as nearly as I can now fix the date, following—

Q. (Interposing) State the substance of your first conversation? A. The substance of the first conversation I had with Mr. Watson was to ask him for a settlement for these eighteen cars of coal that had been shipped by mistake to his company. 842

Q. Had you been paid for the fifteen cars of coal? A. No, sir, we have never been paid.

Q. Go ahead and state the details of that conference, as far as you can?

The Court: What did you say to him about any cars shipped by mistake?

The Witness: To Mr. Watson?

The Court: Yes. I do not know how you knew that anything had been shipped by mistake. How did that question come up? What was the substance of that conversation? 843

The Witness: The Pittsburgh & West Virginia Coal Company received a notice from Long & Co. of Clarksburg, West Virginia, that thirty-three cars of coal had been shipped on the 30th day of October, 1920. The Pittsburgh & West Vir-

844 *Testimony of Thomas F. Barrett—Recalled—
Direct.*

ginia Coal Company had no knowledge of any such order, except as to fifteen cars. I thereupon took the matter up with Long & Co., and went over their records, and they showed that they had shipped the fifteen cars, and also showed that our office in Fairmont—the Pittsburgh & West Virginia Coal Company's office—had remitted to them \$12,000 in payment on that order. Long & Co. contended that the young man in the office of the Pittsburgh & West Virginia Coal Company had given them a quasi approval of that large order. A controversy arose, but I suppose that is not testimony—except it would be explanatory.

845

Mr. McNeill: No.

The Witness: I took the invoice and traced the matter up with the Baltimore & Ohio Railroad and with the Tidewater Coal Exchange, and I found that the coal had actually been delivered and gone beyond—

846

Mr. Hickox (*Interposing*): I object to this. This witness is testifying about matters which he cannot possibly know about.

The Court: Yes. Strike out that the coal had been delivered. We are coming now down to the conversation you had with Mr. Watson.

Mr. McNeill: Yes.

The Witness: After having informed myself of the situation, and that these

Testimony of Thomas F. Barrett—Recalled— 847
Direct.

eighteen cars of coal had been shipped by mistake to his company, I took it up with Mr. Watson. Watson's first answer to me, at the time of my first visit to his office, which is at 25 West 43rd Street, I believe—yes, 25 West 43rd Street—was to the effect that he did not know anything at all about this shipment, when I exhibited the car numbers and other evidence to him; but he said it was possible that some of his agents had purchased the coal; but that about that time he had purchased two thousand cars of coal for export, to go to Curtis Bay, for export, and that he would have to have time to check up his record, and to ascertain whether or not that coal had actually been received—which he promised to do in ten days or two weeks. About ten days or two weeks later I saw him again at his office at 25 West 43rd Street, and he told me then— 848

Q. (Interposing) Now, wait a moment. At the time of the first conversation, what did he say, if anything, as to what he would do about settling, provided his records checked and he found he had received the coal? A. We did not go into that; that did not come up at that time. 849

Q. Then go ahead? A. Because I accepted his explanation that he did not know whether the coal had been shipped or received. He promised to check it up. On the second conversation,

850 *Testimony of Thomas F. Barrett—Recalled—*
Direct.

about two weeks later, he told me he had checked up and found that all the cars had been received in the pool at the Tidewater Coal Exchange, to which it was consigned, to their order, and under their government permit number. Then we took up the question of the discussion of the price. His first attitude was that the coal had been ordered from us by Moore & Co., of Philadelphia, and that we should look to them for payment. My answer was that the coal which was shipped to Moore & Co., was another and distinct lot of coal; that this coal had been shipped by mistake, and had gone to the credit of his company at the Tidewater Coal Exchange in Baltimore, by his consent, and that we expected him to pay for it at the price which prevailed at the time it was shipped. He objected to that, and then we took up the general discussion of liability under the rules of the Tidewater Coal Exchange. He said we should have diverted the coal to some one else, and I told him that under the regulations of the government, coal could not be delivered to the piers at Curtis Bay for export, except under a government permit, and once it had been consigned under that permit and had passed the railroad scales, it was impossible to recall it or to divert it. He then took up the question of settling on the price. He refused to pay at \$9. a ton, the price at which the allotment had been sold, that was shipped through Moore & Co., and we discussed what the price should be, and he said that coal at that time was selling around four or five dollars a ton at the mines—that is, at the

Testimony of Thomas F. Barrett—Recalled— 853
Direct.

time of my last conversation with him—and that he would be willing to adjust it upon that basis, if we could agree on that. I told him we were entitled to settlement at the price prevailing at the time that he was notified by the Tidewater Coal Exchange that the coal had been listed to his credit; and he demurred to that and we did not get any farther; and finally I turned the account over to Mr. Stires, a member of the New York Bar, for collection, and I never had any more conversation with Mr. Watson about it.

854

Q. Did he state to you whether or not the whole thirty-three cars had gone to their credit at the Tidewater Coal Exchange? A. He did, at the last conversation; he said they had checked it up and found all the cars had been received.

Q. Did he state whether or not he had made any settlement with Moore & Co. for any part of it? A. We did not take that up. He agreed with me that it being a mistake, and they having received the coal, that they were liable for the payment. The thing that we disagreed about was the price.

855

The Court: Did he ever state to you, or did anybody state to you, that they had used the coal?

The Witness: Yes, your Honor, they did.

The Court: Now, just go into that conversation and tell when and where and who it was—because you are not going to get in a quasi contract here just because coal was credited to him in the Tidewater

856 *Testimony of Thomas F. Barrett—Recalled—
Direct.*

Coal Exchange; you have got to show some kind of acceptance by them.

The Witness: That is what I was going to say. I have undertaken to testify to the fact that Mr. Watson, so far as the shipper was concerned, accepted the coal.

The Court: Well, how do you know that? He differed with you as to the price; he simply said it was down there. What had he done about the coal in the way of accepting it?

857

The Witness: At the time that he offered to pay for it on the basis I have testified to, he stated then that they had accepted the coal. Of course, if they had not accepted it, they would not have offered to pay for it. His acceptance is implied from his offer to settle.

Mr. Hickox: That is your implication, sir?

The Witness: No, sir, that is not my implication. It was his statement.

858

Mr. Hickox: Do you mean to say now, that Mr. Watson ever used the term "we accepted the coal"?

The Witness: I do not mean to say that he said it in just those words, but I do mean to say that he said his company had received and accepted the coal.

Mr. Hickox: No. Did he ever say to you that he had accepted the coal?

The Witness: I have just said so.

Mr. McNeill: I am not through with the witness, if your Honor please.

Mr. Hickox: All right. Excuse me.

Testimony of Thomas F. Barrett—Recalled— 859
Direct.

By Mr. McNeill:

Q. In connection with that conversation, please state whether or not he said anything about delivering the coal back to you, or having it delivered to any one else? A. That could not be done, and that never came up. The whole matter was under government regulation at that time, and it was impossible for any person to do anything except what the strict rules and regulations of the government required.

860

The Court: That is all right, but if you are claiming that a man must pay for coal that was shipped erroneously because of some governmental regulation, that is absurd on its face.

The Witness: I did not mean to say that he must pay for it on that account, but Mr. McNeill asked me if the question of the return of it was taken up, and I said that could not be done.

The Court: Well, you have got to show some acceptance here or an express contract; and if you haven't got that you have got to prove that this company or these men who received the coal had promised to pay something, or had used the coal or something of that sort. Do you know anything about any use of this coal?

861

Mr. McNeill: I was going to ask him that, if your Honor please.

862 *Testimony of Thomas F. Barrett—Recalled—
Direct.*

Q. Do you know what became of the coal? A. Well, I undertook to testify to that a few moments ago, and that was ruled out. In my conversation with the people at the Tidewater Coal Exchange—the only place that I could get that information, the concern that delivered it to the Diamond Fuel Company—

863 Q. (Interposing) Well, you have had other conversations with Mr. Watson about what became of this coal. Just state, based on those conversations, if you have had them, what became of this coal actually?

The Court: When did you have these conversations?

Mr. McNeill: Yes, and when?

The Witness: The only conversation I ever had with Mr. Watson—the last one I just testified about—they had received the coal at the piers in Baltimore, and it had been credited to his account, and they had accepted it and used it.

864 The Court: They had used it?

The Witness: They had accepted it and used it, according to the purpose for which it was shipped.

Q. What do you mean by used it?

The Court: What did he say about using it? I do not want to know what Mr. Barrett understood, but what he said?

Mr. McNeill: Yes.

Testimony of Thomas F. Barrett—Recalled— 865
Direct.

The Court: I want the conversation with Mr. Watson in regard to any disposition which the alleged bankrupt had made of these eighteen carloads of coal.

Mr. McNeill: It was thirty-three carloads in all, your Honor.

The Court: But fifteen was under the order.

Mr. McNeill: Yes.

The Court: Then, I mean the eighteen carloads, so-called mistakenly shipped 866
eighteen carloads of coal—what he said about the use of that or the disposition of that?

The Witness: Mr. Watson stated to me what I have heretofore said, that the coal had been received by them at the piers at Curtis Bay, that they had had notice from the Tidewater Coal Exchange that the exact car numbers which we charged them with had been received for their account; that they had accepted it and made use of the coal, along with other shipments, and 867
that they were willing to pay for it, but not at the price we sought to receive payment for.

The Court: I see.

Q. Do you know whether or not this very coal or the proceeds thereof is a part of the assets now under attachment by the clients of Mr. Hickox, in Baltimore? A. Well, I only know, to this extent, that I examined the records and found that this coal had left the mines on the

868 *Testimony of Thomas F. Barrett—Recalled—
Direct.*

exact date,, as I now recollect it, that the attachment was issued out in the admiralty proceeding in Baltimore, and, of course, when the coal went down to Baltimore at the piers, it ran right into that attachment. Now, whether it was covered by a subsequent lien or not, is a matter of law that I am not here to discuss, but which we will take up later.

869 Q. Mr. Barrett, you knew the prices of coal of various grades and the run-of-mine at that time, did you not? A. I did, yes, sir.

Q. Was \$9 a fair price at that time? A. It was the prevailing price at the mine at that time?

Q. At the time you were offered \$5 by Mr. Watson, was that the then prevailing price? A. I think it was, about; the price had broken very severely. It was the beginning of a decline in the market, which came very rapidly.

The Court: When did Mr. Watson offer you this price?

870 The Witness: He offered it at the time of my second interview with him.

The Court: And when was that.

The Witness: That was about, as nearly as I can fix it, your Honor, about the 12th or 15th of December, following the shipment of this coal.

The Court: Was that the time when he said he had gotten the coal and used it?

The Witness: Yes, that is the time.

Mr. Hickox: What was the date that he said that?

Testimony of Thomas F. Barrett—Recalled— 871
Cross.

The Witness: About the 12th or 15th of December. I cannot fix it exactly, Mr. Hickox.

Q. At that last conversation—

The Witness (Interposing): I might be mistaken about the date. It might have been earlier in December.

Q. Did you or Mr. Watson know at the time of your last conversation, that this coal had been attached in Baltimore? A. I did not know about it at that time. 872

Q. Did he know about it at the time? A. I cannot say that. The subject was not brought up.

Q. He did not state to you that he knew it?

Mr. Hickox: Oh, now—

The Witness (Interposing): He did not say anything about it.

Q. When did you first get information about the attachment in Baltimore? 873

Mr. Hickox: I object.

The Court: What difference does that make?

Mr. McNeill: That is all.

Cross Examination by Mr. Hickox:

Q. Now Mr. Barrett, you state positively, do you, that Mr. Watson said to you, somewhere around the 15th of December—

874 *Testimony of Thomas F. Barrett—Recalled—
Cross.*

The Court (Interposing): Let me ask you, is this your last witness?

Mr. McNeill: No, sir; we have one other witness, your Honor.

The Court: Go ahead.

875 Q. Now, Mr. Barrett, do you state positively that somewhere about the 15th of December, Mr. Watson stated to you that he or his company had accepted and used this coal that you have been testifying about, at Baltimore? A. That is so, except as to the date. I cannot be sure about the date. Sometime in the early part of December.

Q. But you are quite positive he said he had used it? A. I am quite positive that they said they accepted it.

Q. And used it? A. Well, I don't know whether he used the word "used" or not.

Q. You do not know? A. No.

Q. Then we will leave that word out. You are positive that he said he had accepted it? A. That his company had received and accepted it. **876** That is what I testified to.

Q. Yes, and you stated two or three times previously to his Honor, on direct examination, that he said he had used the coal? A. Well, I did not say that just in those words.

Q. Yes, you did say it in just those words. Do you wish to repudiate it now? A. I do not.

Q. Very well. Then, we will take that testimony as already given— A. Oh, I am willing to stand on my original testimony, but not upon your construction of it, however.

Testimony of Thomas F. Barrett—Recalled— 877
Cross.

Q. Oh, your original testimony, as indicated by the minutes, is what you are prepared to stand or fall on, is it? A. Absolutely.

Q. When you stated on your examination in this court a little over two weeks ago, that prior to October 29th the Pittsburgh & West Virginia Coal Company received from the Diamond Fuel Company an order for twenty-nine carloads of coal, and subsequently stated to the Court that the order was in writing, was that testimony true or not? A. I did not give the testimony in that way, and if that is in the record, it is not correct. 878

Mr. McNeill: What page are you reading from?

Mr. Hickox: Page 94.

Q. Now, I will read from the minutes, if your Honor please—

Mr. McNeill: I object to that. He cannot contradict the witness by reading from the stenographer's minutes. The only proper way is to produce the stenographer and have him read from his original notes. 879

Mr. Hickox: All right, here he is.

The Court: You may ask him about it after you read it to him.

Q. Do you deny, Mr. Watson, that you— A. (Interposing) I beg your pardon. I am not Mr. Watson.

880 *Testimony of Thomas F. Barrett—Recalled—
Cross.*

Q. Mr. Barrett, rather? A. You are greatly mistaken.

The Court: Just ask him the usual question, if such and such a question was put to him, and if he answered so and so.

Mr. Hickox: Yes.

Q. On your examination on January 16th, was this question put to you, page 94 of the stenographer's minutes:

881

"Q. What were the relations between the Pittsburgh & West Virginia Coal Company and the Diamond Fuel Company prior to February 25, 1921, if you know?

"Mr. Hickox: I object to that.

"The Court: I will overrule the objection.

"The Witness: Prior to October 29th the Pittsburgh & West Virginia Coal Company received from the Diamond Fuel Company an order for twenty-nine carloads of coal.

882

"Mr. Hickox (Interposing): I object to this.

"The Court: Objection sustained. It was in writing, was it not?

"The Witness: Yes."

Now, do you deny that those questions were put to you, and that you testified as you are reported there? A. I deny that I said twenty-nine

Testimony of Thomas F. Barrett—Recalled— 883
Cross.

carloads of coal. I said twenty carloads. It is either a typographical mistake or a stenographic mistake. I stated at that time that the—

Q. (Interposing) No. Do you deny that you are correctly reported, according to what I have read to you? A. As to twenty-nine carloads of coal, yes.

Q. But otherwise it is correct? A. Well, I will have to ask you to read that again—that is, my testimony.

Q. All right: (Reading). 884

“The Witness: Prior to October 29th the Pittsburgh & West Virginia Coal Company received from the Diamond Fuel Company an order for twenty-nine carloads of coal.”

My objection came then, and then the Court said: “Objection sustained. It was in writing, was it not?” “The Witness: Yes.”

The Witness: Well at that time—

Q. (Interposing) No. Answer yes or no. Is 885
 that correctly reported? A. Only partly correct.

Q. Well, in what way is the testimony that I have read to you incorrect? A. Well, as to the number of cars, and then a part of my testimony, which probably was not recorded, because it was objected to, and at the moment we adjourned, or soon after we adjourned, I was going on to explain that it was partly in writing and partly oral.

886 *Testimony of Thomas F. Barrett—Recalled—
Cross.*

Q. But we did not adjourn for half a dozen pages after that? A. We did not?

Q. No. I want to get your definite statement whether or not you say that is correct or incorrect? A. I have just told you it was only partly correct.

Q. Did you say you had searched the court records in Baltimore? A. No, sir, I did not.

887 Q. You do not know anything, then, I suppose, about whether or not the proceeds—whether this coal in question ever was attached by the court? A. I only know from the statements of our associate counsel, who are looking after the matter in Baltimore for us.

Q. And do they say it was or was not? A. I beg pardon?

Q. Do they say it was or was not? A. That this particular coal, six or eight cars, was attached?

888 Q. Yes. A. No, we never went into details with them about that. I took it from Mr. Watson's statement to me that it had not been. The order was served first, and this coal was free, and had been used by them for their purposes, which I think is correct.

Mr. Hickox: Now, I ask leave to show what is the undoubted fact, that since the levy of our attachment in the District Court in Baltimore on the 27th day of October, the Diamond Fuel Company has not been permitted to use and has not used any coal that came to its credit within the jurisdiction of the Court.

Testimony of Thomas F. Barrett—Recalled— 889
Cross.

The Court: When was the attachment?

The Witness: October 27, 1920.

The Court: And when did this coal get there?

Mr. Hickox: November.

Mr. McNeill: Subject to confirmation by the court records, we will stipulate that that is true. I think it is true.

Mr. Hickox: Mr. Stires has been down there.

Mr. McNeill: I do not want to say absolutely, but subject to confirmation, we will accept that stipulation. 890

(Informal discussion off the record.)

The Court: Is it true that you claim a right to attach the proceeds of these eighteen carloads of coal that were shipped by Long & Co.?

Mr. Hickox: It is a fact that I will not make any claim, if it be shown that any portion of this property attached consisted of eighteen carloads of coal shipped by Long & Co., consigned to the Diamond Fuel Company. 891

Mr. Stires: Did you not just admit awhile ago that all of the coal which flowed into the Tidewater Coal Exchange to the credit of the Diamond Fuel Company was, in fact, attached by you automatically?

Mr. Hickox: Yes, I believe that is so.

Mr. Stires: Then, is not that somewhat inconsistent with your later statement?

Mr. Hickox: No, not at all.

892 *Testimony of Thomas F. Barrett—Recalled—
Cross.*

The Court: Of course, he attached whatever was there; there is no doubt about that, but the Pittsburgh & West Virginia Coal Company, if that is their coal, should go in and fight it.

Mr. Stires: But they physically took it and sold it.

The Court: To whom?

Mr. Stires: I do not know. To some steamship people.

893

The Court: Who sold it?

Mr. Stires: The trustee appointed in this action instituted by these intervening petitioners here.

The Court: The trustee appointed by Judge Rose?

Mr. Hickox: Yes.

The Court: That was merely an admiralty process?

Mr. Hickox: Yes.

The Court: And the fund takes the place of the coal itself?

894

Mr. Hickox: Yes.

The Court: What the Pittsburgh & West Virginia Coal Company should do is to get their interest in the proceeds of that coal determined, and some undivided portion of it—how many tons of coal was there when it was attached?

Mr. Barrett: 913 tons and a fraction, of these eighteen cars.

Mr. Hickox: The Judge means the total, I think.

Testimony of Thomas F. Barrett—Recalled— 895
Cross.

Mr. Barrett: Oh, several hundred thousand tons, your Honor.

The Court: How many were there at the time of the receipt of this coal, to the credit of the Diamond Fuel Company?

Mr. Barrett: Well, that we could not tell your Honor, because those records are very voluminous, and it would require a long examination, and much detail. I doubt if it could ever be done. The Tidewater Exchange blew up, and it is in the hands 896
of a receiver.

Mr. Hickox: Oh, it would be easy enough to check it. I think there would be no difficulty in checking it at all. They kept very close and voluminous records.

The Court: Have you not any idea whether there were two thousand tons or twenty thousand tons, or two hundred and fifty thousand tons?

Mr. Barrett: I would say that there were several hundred thousand tons, sir.

The Court: Belonging to the Diamond 897
Fuel Company?

Mr. Barrett: Shipped to their credit, yes.

Mr. Hickox: The value of the coal that was sold was somewhere around \$100,000. There could not have been 100,000 tons.

Mr. Barrett: Well, I guess Mr. Hickox is right about that, but the price broke very severely.

The Court: You mean that all the coal there realized only \$100,000.

898 *Testimony of Thomas F. Barrett—Recalled—
Cross.*

Mr. Hickox: Everything that they had there from the 27th of October to the present date represents, I think, slightly more than \$100,000.

The Court: Have you any case, if this Pittsburgh & West Virginia claim is thrown out?

899 Mr. Barrett: Oh, yes; if that is thrown out, we have two undisputed claims, of Law & McCue, and the Morgantown Coal Company. When Mr. Hickox gets through I would like to make some statement respecting our position about this coal.

The Court: I am inclined to think that the Pittsburgh & West Virginia Coal Company has not a good claim.

Mr. Barrett: If your Honor please, I would suggest that we proceed in this case by letting all the proof go in that is offered, and then let us argue it and submit authorities at the close of the evidence.

900 The Court: I do not see much that I want to hear argument upon, except right on the spot. You have put in all the proof that you want, have you not?

Mr. Barrett: Well, to make out a prima facie case I think we have put in much more than was required.

The Court: I am not talking about what is required. Have you any more proof to put in?

Mr. Barrett: Yes, we want to call Mr. Cochrane.

The Court: All right.

WILLIAM H. COCHRANE, called as a witness, being duly sworn, testified as follows:

Direct Examination by Mr. Barrett:

The Court: The attachment was levied on the 27th of October?

Mr. McNeill: Yes.

The Court: When was it received—the coal?

Mr. Barrett: Here are the records of the Railroad Company, showing exactly when it was received. 902

The Court: That covers everything that came in subsequently to the issuance of the attachment? When was it received?

Mr. Barrett: We have here the records of the Baltimore & Ohio Railroad Company—a letter.

The Court: Dated when?

Mr. Barrett: This letter is dated December 20, 1920, these car numbers being identical with the cars described here as having been ordered at the mines and shipped, and they were received on the 9th of November and on the 10th of November, and on the 3rd and on the 4th. All between the 3rd and the 10th of November. 903

The Court: Why does not that put you absolutely out of Court?

Mr. Barrett: They had agreed to pay for the coal and offered to pay for the coal a certain price.

The Court: Who had offered to pay for the coal?

Mr. Barrett: Mr. Watson.

The Court: At a certain price?

905 Mr. Barrett: He offered Mr. Stires five dollars a ton, and offered to settle the account on that basis. Mr. Stires testified to that effect. That being true, we stand upon two things: In the first place, when this coal was ordered, even if it was ordered by mistake and then delivered to the railroad company or to the carrier, that was a delivery to the consignee itself and the delivery was of the date when the coal left the mines and was loaded on the cars, and we stood upon the further broad ground that the Government regulations were such that we could not free this coal after it left the railroad scale. It was bound to go on and be credited to this company. We were also informed at that time or soon after of this attachment proceeding, but it was a contested case and is still contested and likely to be reversed when it reaches the Circuit Court of Appeals. We think
906 it will be and we hope it will be and we expect it will be.

The Court: What case is that?

Mr. Barrett: The attachment case, and that attachment case is not concluded and cannot be decided in this court in this proceeding, and it cannot be a bar in this proceeding that we are undertaking to try here.

The Court: I do not claim it is any bar. What I am saying is, I am asking whether as a physical matter we have anything to do with that coal or as a practical matter,—the coal that was attached, and I do not see how the

statement which Mr. Watson made that they had accepted it is binding when he did not offer to pay anything for it.

Mr. Barrett: The statements that Mr. Watson made about it of course are not binding on us except in so far as the price offered was a settlement of the transaction.

The Court: Do you think if you ship coal to a person by mistake, or simply sent him a lot of coal and they come to you and say, "Well, I am willing to pay you five dollars for the coal," and you say, "You can pay me ten dollars",— you think that that is any indication that title passed? 908

Mr. Barrett: I think it is. It leaves the price unsettled.

The Court: I do not think so.

Mr. Barrett: I was going on to say that we do not consider that this attachment proceeding was any bar to this claim, because we have realized all the time from the time we filed our petition until the present day that we were placed in a position where this claim had to be liquidated and that the court would under the Bankruptcy Act prescribe the method of its liquidation and these facts would be determined. It is a *prima facie* claim upon its face. 909

The Court: I think that is all right. There is no trouble there if there is a claim. In other words if the title to that coal has passed the court will liquidate it.

Mr. Barrett: It did at least provisionally, and we are convinced we have a legal right to bring a suit to recover the amount, and if it is

a provable claim we have the right to sue upon it.

The Court: Very well; you may continue. But first let me ask this: Why is this claim any better than the claim of the Morgantown Coal Company?

911 Mr. Barrett: The distinction is this: The Morgantown Coal Company, a corporation, had dealings with the Diamond Fuel Company similar to ours that had run over a long period of time and the account is for the balance of the account and not for coal shipped under the same conditions and circumstances as this shipment. Your Honor will recall Mr. Yerkes refreshing his recollection from memorandum that he had on the stand, testifying that it was a ledger account against the Diamond Fuel Company at the time the receiver was appointed and for some time prior to that. The same thing applies to the Law & McCue claim.

912 Mr. Girdner: There is no question as to that claim. The deposition regarding that claim has gone into evidence without objection. There are four claimants,—two original petitioning creditors are claimants and their claims were not disputed. There are creditors in addition to that, namely, the Morgantown Coal Company and Law & McCue. Those two intervening claims were fully proven in the depositions which were offered in evidence at the last hearing and they were accepted without objection.

Mr. Barrett: My only object in examining Mr. Cochrane was to identify these telegrams and different records that have been put in. If

those are admitted there is no use of having his testimony at all. He had charge of the records at the office and I merely wanted to call him to identify these telegrams. These records have been put in and if they are all admitted it is not necessary to take up any more time of court and counsel with his examination.

The Court: You will have to be the judge of that.

Mr. McNeill: Everything has been admitted that has been read in evidence.

Mr. Ellenbogen: On behalf of the bankrupt may I add a word to what has been said?

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The Court: Yes.

Mr. Ellenbogen: On behalf of the bankrupt, the bankrupt feels that this fund should go to all the general creditors instead of to a few attaching creditors who have attached this fund in Baltimore. This coal was shipped, it seems, to the Diamond Fuel Company and Mr. Watson has admitted he has received the coal and accepted the coal and there only arose the question as to the price of the coal, the West Virginia Coal Company claiming the price to be nine dollars a ton and the Diamond Fuel Company claiming that the price should be five dollars a ton. That was the only question that was the subject of litigation. There is no question about an acceptance, and that constitutes a pure case of goods sold and delivered, it seems to me as clear as any case that has ever come before the Court, and it makes the West Virginia Coal Company a creditor of the Diamond Fuel Company.

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Mr. McNeill: May I discuss the Baltimore situation? The admitted facts are that claims are brought here by certain creditors in very large sums and all of this property growing out of these very shipments, together with all other shipments consigned to the Diamond Fuel Company, is attached. Under that attachment, and by order of the court—these being creditors now,—before his Honor, Judge Rose, an order of sale of this property passed, the sale directing that this coal, as the property of the Diamond Fuel Company, be sold and the proceeds impounded for the benefit of these very creditors who attached these assets. Another order was passed directing the sale. The sale was had and the property was reported sold, the court assigning a trustee to receive that fund as the fund and asset of the Diamond Fuel Company. At the suit of these gentlemen here that fund is now in the hands of that trustee. The final decree has been passed in that case finding that they are creditors to a fixed extent, and as such creditors they now have that very fund under their attachment in Baltimore claiming that they are the exclusive persons entitled to it, thus claiming the assets of the Diamond Fuel Company. There can be no question about that. There can be no question about this either,—in that case the Diamond Fuel Company came into that court and disputed these claims and set out in that case that it was the owner of these assets and that they did object to it, and they still make that dispute.

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The Court: Is that admitted?

Mr. McNeill: Yes, there is no doubt about that.

Mr. Hickox: There is no such claim at all.

Mr. McNeill: You mean that they admit that they state in their pleadings that they did not own these assets?

Mr. Hickox: No, I say they do not claim anything about it.

Mr. McNeill: You are wrong about that. They fought the case out on the principle that they did own this property, and you were not entitled to it.

Mr. Hickox: The question was fought out on a breach of charter party. We filed a suit *in personam* and had an attachment issued against the property, or against all property of the respondent that might be in that jurisdiction. 920

The Court: Did they try to vacate the attachment?

Mr. Hickox: They never did. They have resisted the claim.

The Court: I asked if they ever tried to vacate the attachment?

Mr. Hickox: They never did.

Mr. Barrett: We never raised the question because we understood it would be dissolved by this proceeding. 921

Mr. McNeill: I was not the counsel in that case and I hope I have not gone too far in stating the facts. I thought those were the facts, that all the property was claimed by that company. Mr. Stires was representing the company, and it is my understanding that he took that position from the beginning.

Mr. Barrett: There was a full contest made of that case and it is still going on, and we are preparing to take an appeal now to the Circuit Court of Appeals.

The Court: What about the right to come in here of subsequent intervening creditors?

923 Mr. McNeill: Just one final word: My view of this question is that this company's claim—and I have had the burden of examining the witnesses, and I ought to be allowed to say something—is this, that an implied contract here is merely made. Coal was shipped from Virginia, consigned to the Diamond Fuel Company, immediately upon its being received the officer of the shipping company goes to the receiving company, and states the fact as to why that is done and demands payment, and he gets the statement, "I cannot pay the price you want, but I will pay at another price." I say that that settles every question between those contracting parties except the question of price, and besides that is not the only issue. We have shown by Mr. Stires that he

924 confirmed that item, and he had an agreement that he would be paid as attorney for the shipper the same value of five dollars per ton for the coal. There was no effort to repudiate the contract by the company receiving the coal and no statement or testimony from which your Honor could conclude that they were unwilling to pay for it at the then prevailing price. Having offered to pay for it I see nothing lacking in making an implied contract about receiving and paying for it.

Mr. Barrett: Stetson, Jennings & Russell are representing the intervening creditors.

Mr. Girdner: If I understand the proof that has been put in so far, there was a motion made the other day for an adjudication. I make that motion on behalf of the intervening creditors. I maintain that my motion should prevail on either or both of two theories: either that all the claims have been established here by competent proof, or that two claims have been established belonging to original petitioning creditors and two claims have been established by the intervening creditors. The second ground is the only one that I am in position to discuss. These other matters are collateral to our client and I am not in a position to add anything further to what has been brought out. If your Honor has had an opportunity to examine the cases which I have included in my memorandum you will see that the situation is this: The original petition alleged an act of bankruptcy, which I think is the third act of bankruptcy,—or the second act of bankruptcy, namely, that the alleged bankrupt has transferred, while insolvent, a portion of its property to one or more of its creditors with an intent to prefer such creditor over other creditors. At the outset there was some discussion as to whether another act of bankruptcy should be included in the original petition, but for the purpose of our present discussion I think we can eliminate that. That act of bankruptcy requires certain proof. Those facts are first, in the event of a contest the bankrupt's answer has been eliminated, so the only contest is that which the intervening creditors interposed. As to the claim of one of

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the original petitioning parties, the Pittsburgh & West Virginia Coal Company, proof has been offered on that point and it is for your Honor to state whether that proof has been sufficient. As to the two original creditors, no opposition has been interposed whatever so that claim stands on the record. Subsequently our clients intervened, the Morgantown Coal Company and Law & McCue and their claims are proved by deposition which went into evidence without objection. If there were any objections to this deposition such objections are waived, so we have got the situation now where there are four claims proven, of four claimants having provable claims. Another issue that has been fully dealt with here by the testimony which has been uncontroverted is as to the effect of these original claims, and in my memorandum I cite a number of cases bearing on that very point. I do not want to burden your Honor by reading the authorities.

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The Court: Have you got a good case for this district?

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Mr. Girdner: Yes, sir.

The Court: Where a defective petition was cured?

Mr. Girdner: Yes, this comment that I am reading from here.

The Court: What page?

Mr. Girdner: In my brief at page 16, a statement by Judge Lacombe—I think it was, in the case of *Re Bolognesi*, at 233 Fed., 771 (C. C. A. 2nd Cir.), in which Judge Lacombe is dealing with the decision which Mr Hickox cited or one

of the decisions which Mr. Hickox cited at our last hearing: He says:

"If the opinion in *Despres v. Galbraith*, 32 Am. Bank. R. 170, 213 Fed., 190, in which the court seems to have held that the original petition was void, be construed to hold that intervention under a valid petition, four months after the act of bankruptcy and before the original proceeding was dismissed gives the intervenors no right to proceed, we cannot concur. The case at bar is not within the principle of *United States v. McCord*, 233 U. S., 157, 34 Sup. Ct., 550, 58 L. Ed., 893, because here there was no 'vice in the original suit'. The original petition was a valid one, under which bankruptcy could have been adjudicated, except for the interposition of an affirmative defense of estoppel."

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As I understand it, the point in our case is this: Where there has been a petition valid on its face, whether there is a *prima facie* case made out on the petition, that petition may subsequently be upheld and supported by the addition of claimant's proof. In the *Galbraith* case that Mr. Hickox cited the facts were a little bit unusual. In that case there was an assignment. The act of bankruptcy was an assignment for the benefit of creditors and it appeared that the three petitioning creditors were the assignees, therefore the Court very properly held that there was an estoppel which operated against

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them and under no circumstances could they become parties to the petition.

935 It has also been held in a case where an assignment of the claim of the intervening parties has transpired subsequent to the time of filing the petition—I have cited a case on that—the Court has held where the petitioning creditors acquired their claim by assignment subsequent to the filing of the original petition—the Court says that those claims do not support the original petition because that allows a method for getting around the provisions of the bankruptcy act. That situation does not exist here. Here as I say there has been a petition filed by three parties antagonistic to the alleged bankrupts, three parties petitioning for the adjudication in bankruptcy. The petition is correct on its face. The only defect is if there be one, that one of the parties has not established the claim to be proven. Let me read you one or two comments on that situation.

936 In the case of *Corwith Bank vs. Haswell*, the Court goes on to say:

“The contention is that, as the original petition was defective for want of parties, the adjudication on that petition as amended, and the order relating that amendment back to the date of the original petition, was erroneous. The importance of this contention for the bank rests in this: If the ‘filing of the petition’ within the meaning of section 60 of the bankruptcy act, concerning unlawful preferences, has relation to the filing of the original petition only the pref-

erence which the bank received would be defeated, because less than four months had then elapsed since it was given. If, on the contrary, it has relation to the filing of the amendment, as in this case, the preference would be protected, because more than four months had then elapsed. This contention is clearly untenable."

The Court: Who says that?

Mr. Girdner: That is the case of *Corwith Bank vs. Haswell* 174 Fed., 209.

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The Court: 'Circuit Court of Appeals?

Mr. Girdner: Yes, Eighth Circuit. Then again—

The Court (interposing): There was a defective petition, was there?

Mr. Girdner: Yes, there was a defective petition. Again, in the case of *In re Mackey*, 110 Fed., 355 (Del.), the Court goes on to say:

"As insufficiency in the number of the petitioning creditors is not incurable jurisdictional defect, by parity of reasoning insufficiency in the amount of provable claims of such creditors cannot be held such a defect; for the bankruptcy act equally requires sufficiency in number and sufficiency in amount in order that the petition may be sustained. Clause 'f' was evidently intended to correct defects of either kind at any time during the pendency of the proceedings, whether before or after the expiration of four months from the alleged act

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of bankruptcy. This construction of the clause is in harmony with its language, is calculated to protect the interests of creditors, and involves no hardship to the defendant."

I think the leading case on that is the case in 92 Fed., *in re Romanow*, 510, in the Massachusetts District:

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"Those who are permitted to 'join in' a petition, by so doing commonly become parties to it; and the words 'join in the petition' as used in paragraph e and paragraph b of the same section, plainly carry that implication. It is urged by the respondents that, if this construction be given to paragraph f, an insufficient number of creditors, or creditors having an insufficient amount of claims, may file a petition against a debtor, and obtain an adjudication by subsequently procuring other creditors to join with them, such joinder being possible at any time before the petition is dismissed. This practice, it is said, would permit a petition, at the time of its filing insufficient in substance as well as in form, to be made good by subsequent acts."

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That same reasoning has been followed time and again. There is another very good reason for holding that way. All creditors who know of the pendency of the proceeding, and who see and have knowledge of the proceeding are entitled to rely on the face of the petition. They do not

need to intervene. They can rest on that sense of security. That is exactly the situation here. For these reasons, if your Honor please, I renew the motion heretofore made for an adjudication.

Mr. Hickox: I oppose the motion on the same grounds as I urged before.

Mr. Barrett: There are some matters in the record here to which I would like to call the court's attention and which I have mentioned once or twice before but which were allowed to go over until now. One is that there was some discussion before the bar of the court on the 15th as to whether this paper which was offered by Mr. Gillig, one of the counsel for the Diamond Fuel Company, was intended as an amendment to the original petition. Of course if there is anything of that kind in the record I want to withdraw it and we stand upon the original petition as now on file. The paper which Mr. Gillig brought into court was a set of resolutions passed by the Board of Directors which had attached to it the consent of the stockholders of the Diamond Fuel Company authorizing him to withdraw its answer, and it was put in that form because it was believed that only the corporate action of the company taken in that way could authorize an attorney to take that step. We do not want any question about it, and when the resolutions themselves were brought into court there seemed to be some confusion as to what they meant, and what I want to express to the court is that we stand on the original petition as filed in February, 1921—I do not recall the date.

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There was also some discussion by Judge Rockwood and Mr. Hickox before the bar of the court in respect to an oral amendment, about its inability to pay its debts and therefore should be adjudged a bankrupt. If there is anything of that kind in the record that constitutes an amendment to this petition we want it stricken out because the whole purpose of this proceeding would be defeated if that took place.

947 The Court: What does the record show in that regard?

Mr. Barrett: If there was any amendment, if the record shows that the petition has been amended at the bar of the court, I want that withdrawn.

The Court: Don't you know what the record shows? I cannot carry all these things in my mind. Counsel ought to know what the record shows.

948 Mr. Barrett: I think the record does show it, and I want to withdraw the amendment and state to the court that we stand upon the original amendment. I have not looked at the record myself, but I am advised that the record shows the petition was in that respect amended at the bar of this court. I want to withdraw the amendment and state that we stand upon the averments in the original petition.

The Court: What was this amendment?

Mr. Barrett: There was some discussion about the company making an admission in these resolutions of its inability to pay its debts.

The Court: You mean relating to the act of bankruptcy?

Mr. Barrett: Yes.

The Court: And what act of bankruptcy was pleaded as amended?

Mr. Barrett: I am coming to that. The petition, in addition to the jurisdictional averments necessary to be set up, alleged that the Diamond Fuel Company on the 27th day of November, 1920, while insolvent and with intent to create a preference in behalf of the Gordon B. Late Coal Company and others of its creditors, conveyed to one Charles S. Chestnut of Philadelphia, Pennsylvania, mining properties in Barbour County, West Virginia, which is estimated by the petitioners to be of the value as near as they could determine, of about \$100,000, and that the cash proceeds of such sale were used to make preferential payments to the said Gordon B. Late Coal Company and other creditors named in the petition, but not to any of the creditors who are parties to the original petition filed in this case. The Diamond Fuel Company interposed an answer to the petition, which answer contained general denials of the allegations set forth in the original petition. On the 16th day of January, 1922, the date set for the trial of this case, the Diamond Fuel Company by its counsel appeared in court and before other proceedings had been taken, exhibited to the court certified copies of resolutions by the board of directors of said Diamond Fuel Company, accompanied by a written consent of the stockholders of said company, authorizing Otto Gillig, a member of the New York Bar, to withdraw its answer and consent to an adjudication, and without quoting the substance of the resolutions of the board of directors, to withdraw opposi-

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tion on the part of the defendant to such adjudication. The alleged bankrupt's answer, therefore, ceased to be a part of the record of this case. The proceeding is upheld as the proper practice by the court in the case following:

953 "A debtor who contests an involuntary proceeding in bankruptcy against him does so in his own behalf, and not in the interest of his creditors and is at liberty to withdraw his answer at any time when done in good faith and without notice to his creditors." 145 Fed., 396.

This effectively disposes of all opposition on the part of the alleged bankrupt, and places it in the position of now supporting the prayer for adjudication contained in the original petition.

The Court: What is this that you are reading?

Mr. Barrett: Simply a memorandum of my own.

954 The Court: I know that, but what is it you are quoting from, the petition or the record or what? I don't know what you are talking about.

Mr. Barrett: This is just a memorandum of my own.

The Court: I know that but you are quoting some amendment or some allegation or some authority.

Mr. Barrett: I am stating what the original petition says. I have it here in my hand.

The Court: I asked you what that was, whether it was an amendment or whether it was an original statement of the petition?

Mr. Barrett: This is just a memorandum of my own, your Honor, but in order that we may get the matter clearly and briefly before the court I want to read one paragraph from the petition which charges the act of bankruptcy:

"That within four months next preceding the date of the filing of this petition, to-wit, on the 27th day of November, 1920, the said Diamond Fuel Company while insolvent committed an act of bankruptcy in that it did, on the 27th day of November, 1920, convey to one Charles S. Chestnut of the City of Philadelphia, his heirs and assigns forever, parcels of land," etc. 956

The Court: That is what you just read.

Mr. Barrett: I am reading from the petition now, your Honor.

The Court: That is what you just read from your memorandum.

Mr. Barrett: No, this has reference to it. I did not read the exact language. I want to bring it to the court's attention that this petition charges an act of bankruptcy under the Bankrupt Act. It is charged with all the necessary detail to make a complete and perfect petition in that respect, and to give full and complete notice to the alleged bankrupt of what is charged against him as an act of bankruptcy. 957

The Court: They also say or it has been stated here that that was proved in the deposition, that act of bankruptcy.

Mr. Barrett: That is true.

The Court: What amendment has been made that you want stricken out?

Mr. Barrett: The amendment that was made and stricken out—

The Court (interposing): No, what amendment has been made that you want stricken out?

959 Mr. Barrett: The amendment, if I am correct about it—I am only doing this to safeguard the record so far as we are concerned—was an amendment offered by Judge Rockwood and I think afterwards withdrawn by him, but I want to be sure about it, that expressed the company's inability to pay its debts and its willingness to be adjudged a bankrupt—something to that effect. That was in addition to the original petition, however.

The Court: Is that the only amendment that you are wishing to strike out?

960 Mr. Barrett: That is the only amendment. The other is my motion to strike out the answer of those intervening creditors opposing the adjudications, and I have an abundance of authorities and reasons for that which I would like to submit to your Honor.

The Court: The motion to strike out what answer?

Mr. Barrett: I don't know what your practice is here, but that is the way we go about it in Virginia, where the answer is sufficient and cannot be met by a demurrer, where it is insufficient upon its face.

The Court: Is it insufficient upon its face?

Mr. Barrett: Yes, our practice would be a motion to strike it out.

The Court: All right, whether it be a motion to strike out or a motion for judgment on the pleadings as immaterial, but I did not know you were claiming it was insufficient on its face. I didn't know that you contended that seriously.

Mr. Barrett: We claim that very seriously. It does not show that the opposing creditors here are creditors of the company. It says nothing in support of that fact at all. Any person might walk into Court and say, "We are creditors, we oppose this adjudication." There is no evidence before the Court either in the pleadings or in the testimony that they are creditors at all. They simply make the assertion in their petition that they have a provable claim.

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The Court: All right, that is the trouble with their petition?

Mr. Barrett: That is the trouble with the petition.

The Court: That they have not gone forward and assumed the burden of proof?

Mr. Barrett: I will state it the other way.

The Court: I wish you would answer the question. Do not reply by something else. Isn't that the trouble with their petition? In other words, the trouble with their petition that you are criticizing is that they have not gone ahead and proved their claim before you went into your case?

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Mr. Barrett: Not exactly proved their claim, but in their answer they set up no affirmative averments of any kind, they describe no claims and give no details or do not state anything about the nature of their claim, what it consists of or the amount or anything else to put us on notice here that it is provable or unprovable.

The Court: What authority have you in respect to that?

Mr. Barrett: I would like to show your Honor the authorities that I have. May I read a short memorandum, which I think will be the quickest way of putting it in?

The Court: Yes.

965 Mr. Barrett: An answer, however, is interposed on behalf of two objecting creditors, namely, Canute Steamship Company, Limited and Compania Naviera Sota y Aznar, which answer contains denials of insolvency, the act of bankruptcy (but concedes that the transfer of the property in Barbour County took place as alleged in the petition) and denied that the Pittsburgh & West Virginia Coal Company, the Morgantown Coal Company and Law & McCue have provable claims.

On the first hearing of this case counsel for the petitioning creditors moved to strike out the answer of the opposing creditor and assigned as grounds for the motion the following:

966 That is appeared from the answer of the opposing creditors and from statement of counsel and from the record so far made in this case, that the opposing creditors have a lien on a part of the property of the Diamond Fuel Company obtained by an attachment issued in a proceeding in admiralty in the United States Court for the State of Maryland, sitting at the City of Baltimore, which attachment lien was secured on the 28th day of October, 1921.

The right of creditors to intervene in a bankruptcy proceeding for the purpose of resisting

an adjudication is authorized by Section 61f of the Bankrupt Act in the following language:

“Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.”

It is a well settled principle of law, however, that this right is extended by the Bankrupt Act only in recognition of such creditor's interest in assisting the debtor to remain in control of his own affairs and to prevent his debtor from being put in bankruptcy; unless he be insolvent or has committed an act of bankruptcy. But the right of intervention is abused by an attempt upon the part of such intervening creditor to resist the adjudication where the debtor is clearly insolvent and has undoubtedly committed an act of bankruptcy. 968

The original petition charges the act of bankruptcy defined in Subdivision 2, Section 3 of the National Bankrupt Act, which is in the following language:

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“Acts of bankruptcy by a person shall consist of his having transferred while insolvent any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors.”

The Court: Why don't you get down to the question of your authority, if you have one on this matter pleaded. That is the only point

that I have in my mind. Have you authority for the proposition that it is insufficient for any person to come in and say they are creditors—that they have got to go forward themselves and prove it?

Mr. Barrett: Yes.

971 Mr. Girdner: I would like to get the record straight, as I understand the situation it is this: At the beginning of the trial a motion was made to amend the original petition by showing the company's inability to pay its debts. A resolution of the board of directors of the Diamond Fuel Company was handed up to the court and the petition offered by the attorney for the Diamond Fuel Company, and there was argument as to whether an adjudication could be had on that act of bankruptcy. It is my motion now that any amendment made at that time be now stricken from the record and that the petition stand as originally filed, because I want to avoid the possibility of an adjudication, based on that contention of insolvency which was made in the form of a resolution of the company in December, 1921, 972 which would defeat the purpose of this proceeding, and I think we have established the proper act of bankruptcy under the second provision of the act and that is what we stand on now.

The Court: That is the only amendment that was made, was it?

Mr. Girdner: Yes.

The Court: Or admitted?

Mr. Girdner: Yes. Will your Honor rule on that?

The Court: Do you want to be heard on that?

Mr. Hickox: No.

The Court: I will grant the motion.

Mr. Barrett: I am about to read further.

The Court: I asked you a very simple question about your authority at this point. I don't want to hear a long preliminary argument in a brief.

Mr. Barrett: I am just about to read from *in re Columbia Real Estate Company*.

Mr. Ellenbogen: I suggest the authorities be submitted to your Honor.

The Court: I think it is probably better to submit a memorandum if you have it. If you are ready to submit your memorandum I will take the whole case. 974

Mr. Hickox: So far as I understand the objection to our answer is concerned, we maintain it is entirely too late for any question to be raised at the conclusion of the trial. If the answer requires us to do anything more, if it should be held that it is necessary for us to prove the claim, we shall ask leave to prove the fact that we allege.

Mr. Barrett: I made the motion at the beginning of the trial, which I think was the proper way, to strike out the answer on the ground of its insufficiency, and I understood that argument upon it would be deferred until after the case, and the argument was all in. 975

Mr. Hickox: I do not recall anything of the kind.

The Court: He made a motion—I do not remember the detail of it, but he has always argued that this whole proceeding was irregular,

and you had the burden. I have overruled him on that point. It might possibly be that I did not grasp his point, that you had some legal duty to prove your claim. He went into his case. I don't know what your claim was, but your ability to prove your claim was disputed. I will allow him to amend his answer if he did not set forth his claim sufficiently. I would not strike it out. I might strike it out unless he amended it, but you would be right back where you are now.

977 Mr. Barrett: That would be true, but I will call your Honor's attention to some authorities I will read now:

978 "We are of the opinion from these provisions and their consistency with the general tenor of the Act that the intention clearly appears that the only claimants who are entitled to hearing on the issue of involuntary bankruptcy, aside from the bankrupt, are the creditors of the bankrupt; that creditors having security or priority are excluded therefrom to the extent of their security or priority, and can be recognized only in that way for unsecured and unpreferred amounts; that even as a creditor, when he is secured and stands alone on his security, he can neither invoke nor oppose an adjudication of involuntary bankruptcy."

Therefore, the motion of the petitioning creditor is to strike out the answer of the intervening

creditors is further supported by the following authority.

Remington on Bankruptcy, Vol. I, 2nd ed., Sec. 322, p. 278, and cases there cited.

The Court: The position I always thought you had taken was not in objecting because he was a preferred creditor, but that he had the burden of proof and he did not prove his claim.

Mr. Barrett: Your Honor misunderstood me. I said that we were not obliged under the law to put in any proof in answer to such an answer as has been filed and as such a position as has been disclosed or is being disclosed to-day. 980

The Court: Then I misunderstood you.

Mr. Barrett: There is just this one short paragraph that I would like to read to you in *Remington on Bankruptcy*, citing a number of cases, which I have cited before:

"In recognition of this interest of the creditor in his debtor's remaining in control of his own affairs, the statute authorizes the creditor to intervene in involuntary proceedings, to prevent his debtor from being put in bankruptcy unless he be insolvent and has committed an act of bankruptcy." 981

And also the Court used this language:

"This provision was intended to arm the creditor with effective means, placed directly in his own keeping, of assisting the

debtor to resist an improper effort to force him into the bankruptcy, and also to give the creditor like effectual means of preventing his debtor and petitioning creditors from colluding to bring about the adjudication when the debtor is not insolvent and has not committed an act of bankruptcy, and is unwilling to institute voluntary proceedings. It was not within the contemplation of the statute when the debtor is in fact insolvent and has committed an act of bankruptcy, to give to the creditor the right to contest the adjudication, merely to keep alive a lien or levy, which would be destroyed if the petition be not defeated; for that is contrary to the spirit and purpose of the Bankruptcy Law. The contest of the petition for the latter purpose is an abuse of the statute."

There are any number of authorities and text writers who have held along the same line. Any number of claims are not provable in bankruptcy. How may we be informed as to whether in fact the claims they pretend to have are provable or not unless the nature and amount of such claim with other necessary detail is fully stated and verified under oath. It is stated *inter alia* outside of the record, and it is a matter of general gossip that they are attaching creditors. If this be true and they stand on their attachment lien, they have secured a preference in which case they can neither invoke nor oppose adjudication, using the language of the court in the case of *In re Columbia Real Estate*

Co., from which I have just read from the opinion of the Circuit Court of Appeals.

A secured creditor cannot participate in an involuntary bankruptcy proceeding, except as an adverse claimant holding a lien upon the estate or a part of it, which lien after adjudication he will be permitted to prove in this court in the manner prescribed by the Bankrupt Act.

The Court: Do not state what the Bankrupt Act states. I know that. What do the text writers say?

Mr. Barrett: I have just read from *Remington on Bankruptcy*. 986

The Court: I know that. Have you anything to say, Mr. Hickox?

Mr. Barrett: I have not quite finished. Here is one other case I want to cite:

In support of this contention, the petitioning creditors quote from the opinion of Judge Woods of the United States Circuit Court of Appeals of the District embracing Georgia (Fed. Case #7, 119, Vol. 13 of Fed. Cases). Judge Woods said in part:

987

"In the case of *Boston H. & E. R. Co.*, Case #1677 tried on petition of review before Woodruff, Circuit Judge, it was held that a petition in voluntary bankruptcy was not a mere suit *inter partes* but rather partook of the nature of a proceeding *in rem*, in which any actual creditor had a direct interest, and that a party claiming to be a creditor and who was able to satisfy the court that he was a creditor, and that his purpose was a meritorious one, ought

to be allowed to intervene, and object to the adjudication in bankruptcy. The petitioning creditor loses no right by this practice for if a proper case is made, his debtor will be adjudged a bankrupt."

But in the syllabus of the same case and in the same connection the court decided:

"Where by alleged fraudulent collusion between the petitioner and the defendant, proceedings in involuntary bankruptcy are begun to declare the defendant a bankrupt, judgment creditors, who would be damaged by the adjudication, ought to be allowed to intervene and oppose it."

From this case it will be observed that the court approves the practice of allowing creditors holding liens by judgment or attachment to intervene where the attempt to bring about the adjudication in bankruptcy is through fraud or collusion between the petitioners and the defendant, thus upholding our view that if collusion or
990 fraud is alleged upon the part of the intervenors to exist between the petitioning creditors and defendant to secure an adjudication, the intervenors should be permitted to resist the adjudication upon that ground, and thus protect the lien which they have obtained through their attachment.

There is nothing, however, of that kind in this case. It will also be observed that in the case quoted from as decided by Circuit Judge Woodruff, the learned Judge uses the language:

"any actual creditor who had a direct interest, and was able to satisfy the court that he was a creditor and that his purpose was a meritorious one."

There is nothing in this record to show that the intervenors have a meritorious purpose, or that they have a claim at all except their mere statement unsupported by any kind of detail or proof.

The Court: If you want to take the position that he is not a creditor and question his claim, I shall allow him to put it in and he can put in by proving this judgment. The question whether he has any right to come in here to-day and do anything as a secured creditor is another thing that has not been talked about. That question is raised for the first time and that undoubtedly goes to the heart of the controversy. It may be very vital.

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Mr. Barrett: The difficulty is, your Honor, that if this creditor stands upon his attachment, that right would have to be tried at another time in another way. It could not be tried here.

The Court: I do not know what you mean by that right.

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Mr. Barrett: I mean his right to contest the validity of the statute, his right to take this property under this statute.

The Court: It has been held valid by the Court.

Mr. Barrett: The petition in bankruptcy, if your Honor please, was filed within four months of the time he sued.

The Court: Then if that is true you do not have to discuss the validity of his attachment at all. You are moving to strike out his answer because he was not a creditor. It has been held that he was a creditor by the District Court for the District of Maryland, as I understand it.

Mr. Barrett: But there is no evidence of that here.

The Court: He ought to be allowed to show it and I am going to admit it.

995 Mr. Barrett: The difficulty in the whole proceeding is this, that the attachment in Baltimore gives these claimants a preference. As long as they stand upon the attachment whether they prove it or not, as long as they claim to be a secured creditor they have no standing to contest an involuntary bankruptcy.

The Court: What have you to say about that, Mr. Hickox?

Mr. Hickox: I would like to get this question about these creditors settled. Is it disputed that we are creditors by reason of a final decree in the District Court in Baltimore to the amount of
996 about \$160,000 or \$170,000 and that the property attached is something under \$110,000? If that is not conceded I want to prove it.

Mr. Girdner: On behalf of the intervening creditors, if it is a matter of record I do not see that is necessary to prove it, and I am going to concede it.

The Court: I understand the concession to be not that he has a valid claim, but that the Court has so decided in that proceeding?

Mr. Girdner: Yes. Let us concede exactly what the fact is.

Mr. Ellenbogen: No trustee has been elected yet. I imagine the trustee is the proper party to appeal it.

Mr. Girdner: It is subject to the right of appeal.

Mr. Hickox: Are we by that point?

The Court: I understand that it has been stipulated that a final decree of the court of admiralty in the United States District Court for the District of Maryland has been rendered wherein certain creditors were adjudged to have a claim and a right to recover against the Diamond Fuel Company in the sum of about \$165,000.

998

Mr. Barrett: I would not agree to any such stipulation as that here. We do not want that matter adjudicated here. We will agree that so far as the record is concerned they have a claim.

The Court: If I have not stated it properly, strike out the whole situation.

Mr. McNeill: I think you Honor stated the exact situation.

Mr. Barrett: I will agree to that.

The Court: Who represents this Surety Company here?

999

Mr. Ellenbogen: I represent the Diamond Fuel Company, and I believe your Honor has stated the fact.

Mr. Barrett: I might have misunderstood. I agree to that.

Mr. Hickox: Did your Honor ask me a question?

The Court: You may add to that if you want that the admission is only that such a decree has been rendered and not that it makes a

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Case.

permanent adjudication of the claim which may not be reversed or appealed.

Mr. Girdner: Will you Honor add that it is subject to confirmation as to details and amount, etc.?

The Court: Yes, the admission is subject to confirmation as to amount.

Mr. Hickox: I think you asked me a question which was whether an answering creditor had the right to attach the adjudication. Is that what your Honor asked me?

1001 The Court: Yes. I did not ask you that really, I asked you about a preferred claim.

Mr. Hickox: Our claim is for both, for the attachment, which I said to your Honor amounted to about \$110,000—so we are both attaching creditors and as to a considerable part of our claim, we have not any security at all.

The Court: Is that admitted?

Mr. Ellenbogen: Yes, I admit that. I would like to ask whether they release that attachment or want to stand as a general or preferred creditor?

1002 Mr. Hickox: We are not releasing anything at all.

Mr. Ellenbogen: As far as the bankrupt is concerned, I admit the facts as stated.

Mr. McNeill: I do not wish to inject any technical point in the case, if your Honor please.

The Court: It is admitted that a portion of this claim which has been found to be due under the decree of the admiralty court in Maryland is unsecured by an attachment which has been levied through a process of foreign attachment by the libelants.

Mr. Hickox: Yes. The specific question you are asking me was whether—perhaps I had better answer by reading a sentence from Judge Hazel's opinion in *re Moench*, affirmed by the Circuit Court of Appeals in 130 Fed., 685:

"The question here is whether an attaching creditor shall resist an involuntary petition without surrendering his attachment," and he held that he could.

The Court: You do not claim there is any doctrine whereby a man who has attached something as security cannot proceed in bankruptcy? 1004

Mr. Barrett: Not until after the adjudication has taken place, because he has to come into court then as an adverse claimant to protect his lien. He has either got to come into court after adjudication and appear before the Referee, or in open court and relinquish his security, or stand on a part and hold on to part.

The Court: If he is an unsecured creditor surely he has a right to come in and oppose the bankruptcy, if the Court has not any jurisdiction or there is collusion, or anything of that kind. 1005

Mr. Barrett: If there is collusion or allegations of fraud, that is true. But after the alleged bankrupt itself has withdrawn its answer he cannot do so according to the authorities.

Mr. Hickox: Shall we submit briefs?

The Court: Perhaps you had better, yes.

(Briefs to be submitted by Saturday, February 4, 1922.)

EXHIBIT NO. 1.

Morgantown, W. Va.,
December 28th, 19

Diamond Fuel Company,

To

Morgantown Coal Company, Dr.

	Date	Car Initial & Number	Weight	Tons	Rate	Amount	
Oct.	15, 1920	C&O 51088	87,800	43.90	9.00	\$395.10	
"	15, "	B&LE 43530	96,000	48.00	9.00	432.00	
"	14, "	SOU 189160	122,600	61.30	9.00	551.70	
"	15, "	CB&Q 185968	111,900	55.95	8.75	489.56	
"	15, "	BC&G 1376	101,000	50.50	8.75	441.88	
"	15, "	B&O 128132	116,900	58.45	8.75	511.44	
"	15, "	B&O 27177	110,200	55.10	8.75	482.13	
"	14, "	B&O 137072	109,700	54.85	8.75	479.94	
"	14, "	CNJ 62906	107,800	53.90	8.75	471.62	
"	14, "	N&W 55746	101,100	50.55	8.75	442.31	
"	14, "	NH 52635	90,100	45.05	8.75	394.19	\$5,091.8

Less Credits:—

Dec.	17, 1920	B&O	27177	Confiscated by B.&O.R.R.	\$482.13	
Oct.	25, "	Your	Invoice No. 200		309.40	
Nov.	1, "	"	"	213	737.75	
"	1, "	"	"	214	694.20	
"	1, "	"	"	212	222.30	
"	4, "	"	"	217	269.10	
"	9, "	"	"	223	371.48	
"	29, "	"	"	255	374.40	\$3,460.7

Interest to Dec. 31st, 1921

Balance

Total

\$1,631.1
116.1

\$1,747.2

I hereby certify that the foregoing statement of account of the Morgantown Coal Company against the Diamond Fuel Company is true and correct to the best of my knowledge and belief.

MORGANTOWN COAL COMPANY,
BY E. S. Baumgartner
Treasurer

State of West Virginia,
County of Monongalia, to-wit:

I, THOMAS RAY DILLE, a Notary Public of the said County of Monongalia, do certify that E. S. Baumgartner personally appeared before me in my said County, and being by me duly sworn, did depose and say that he is Treasurer of the Corporation described in the writing above, bearing date the 28th day of December, 1921, authorized by said Corporation to execute and acknowledge deeds and other writings of said Corporation, and that the seal affixed to said writing is the corporate seal of the said Corporation, and that said writing was signed and sealed by him in behalf of said Corporation by its authority duly given. And the said E. S. Baumgartner acknowledged the said writing to be the act and deed of said Corporation. 1010

THOMAS RAY DILLE,
Notary Public.

Given under my hand and seal this the 28th day of December, 1921. 1011

My commission expires on the 2nd day of December, 1929.

(Seal)

1012

EXHIBIT No. 2.

(Statement of GORDON B. LATE COAL COMPANY.)

No. 1.

Sold to Diamond Fuel Company,
New York City.

Statement of Coal Shipped and Invoiced to
Diamond Fuel Company, New York City, as per
attached Invoices.

Coal as follows:

					<i>Amt. in Dollars</i>
1013	1920				
	Aug. 31	To Invoice	Rendered		502.74
	" 31	"	"	"	1572.50
	" 31	"	"	"	3380.41
	Sept. 30	"	"	"	575.35
	" 30	"	"	"	1767.60
	" 30	"	"	"	4506.60
	" 30	"	"	"	4329.45
	" 30	"	"	"	424.55
1014	" 30	"	"	"	5441.03
	" 30	"	"	"	11858.50
	" 30	"	"	"	523.35
	" 30	"	"	"	4594.94
	" 30	"	"	"	403.65

Exhibit No. 2.

1015

					Amt. in Dollars	
1920						
Sept. 30	To Invoice	Rendered			4742.48	
" 30	"	"	"	"	16004.30	
" 30	"	"	"	"	9414.19	
" 30	"	"	"	"	5321.53	
" 30	"	"	"	"	12007.89	
" 30	"	"	"	"	494.88	
" 30	"	"	"	"	2590.93	1016
" 30	"	"	"	"	1564.64	
Oct. 30	"	"	"	"	8278.65	
" 30	"	"	"	"	11796.06	
" 30	"	"	"	"	1990.19	
" 30	"	"	"	"	5366.89	
" 30	"	"	"	"	7441.35	
" 30	"	"	"	"	4301.10	
" 30	"	"	"	"	7433.66	1017
" 30	"	"	"	"	11351.08	
" 30	"	"	"	"	3766.05	
" 30	"	"	"	"	2526.23	
" 30	"	"	"	"	3374.86	
" 30	"	"	"	"	474.30	
Carried Forward					<hr/>	\$160,121.93

1018

Exhibit No. 2.

(Statement of GORDON B. LATE COAL COMPANY.)

No. 2.

Sold to Diamond Fuel Company,
New York City.

Coal as follows:

			Brought Forward		\$160,121.93
				<i>Amt. in</i>	
		1920		<i>Dollars</i>	
1019	Oct.	30	To Invoice Rendered	2169.33	
	"	"	"	"	620.00
	"	"	"	"	1414.80
	"	"	"	"	5789.78
	"	"	"	"	396.50
	"	"	"	"	1084.90
	"	"	"	"	656.55
	"	"	"	"	1654.43
	"	"	"	"	8385.30
1020	"	"	"	"	588.50
	"	"	"	"	962.35
	"	"	"	"	1503.45
	"	"	"	"	3431.45
	"	"	"	"	12058.50
	"	"	"	"	1546.92

Exhibit No. 2.

1021

1920					Amt. in Dollars	
Oct.	30	To Invoice	Rendered		1591.25	
"	"	"	"	"	486.88	
"	"	"	"	"	8941.58	
"	"	"	"	"	7718.15	
"	"	"	"	"	504.45	
"	"	"	"	"	2101.00	
"	"	"	"	"	607.20	
"	"	"	"	"	2653.00	1022
"	"	"	"	"	591.00	
"	"	"	"	"	462.15	
"	"	"	"	"	445.85	
"	"	"	"	"	403.20	
"	"	"	"	"	2250.55	
"	"	"	"	"	1519.00	
"	"	"	"	"	982.58	
Nov.	30	"	"	"	550.00	1023
"	30	"	"	"	1380.50	
"	30	"	"	"	2279.70	
"	30	"	"	"	2943.55	
"	30	"	"	"	1025.59	
					<hr/>	
					\$ 81,699.94	
Carried Forward					<hr/>	
					\$241,821.87	

1024

Exhibit No. 2.

(Statement of GORDON B. LATE COAL COMPANY.)

No. 3.

Sold to Diamond Fuel Company,
New York City.

Coal as follows:

			Brought Forward		\$241,821.87
1025					
	1920			<i>Amt. in</i>	
				<i>Dollars</i>	
	Nov. 30	To Invoice	Rendered		275.63
	" 30	" "	"		784.75
	" 30	" "	"		1594.44
	" 30	" "	"		1197.00
	" 30	" "	"		500.85
	" 30	" "	"		470.50
					\$ 4,823.17
			Total		\$246,645.04

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CREDITS.

	1920				
	Sept. 8	By Check	No. 105		3300.00
	" 11	" "	" 126		5000.00
	" 16	" "	" 196		10000.00
	" 24	" "	" 152		10000.00

Exhibit No. 2.

1027

				Amt. in Dollars	
1920					
Oct. 20	"	Credit Memorandum	55.50		
" 22	"	Check No. 207	20000.00		
" 30		Credit Memorandum	28.50		
Nov. 30	"	"	482.37		
" 30	"	"	703.44		
" 30	"	"	915.33		
" 30	"	"	656.55	1028	
" 30	"	"	45.00		
" 30	"	"	503.55		
" 30	"	"	577.20		
" 30	"	"	519.75		
" 30	"	"	463.42		
" 30	"	"	489.45		
" 30	"	"	557.50		
" 30	"	"	546.55	1029	
Dec. 31	"	"	462.15	\$55,306.26	
Balance Due				\$191,338.78	

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EXHIBIT NO. 3.

THIS DEED made and entered into this 27th day of November, 1920, by and between Diamond Fuel Company, a corporation organized under the laws of the State of Delaware, party of the first part, and Charles S. Chestnut of the City of Philadelphia and State of Pennsylvania, party of the second part.

1031

WITNESSETH: That the said Diamond Fuel Company for and in consideration of the sum of One Dollar (\$1.00) lawful money of the United States of America unto it in hand paid at and before the sealing and delivery of these presents and for other valuable considerations unto it moving, the receipt whereof is hereby acknowledged, doth give, grant, bargain, sell and convey to the said Charles S. Chestnut, his heirs and assigns, with covenants of general warranty, all of the unmined Red Stone stratum of coal within and underlying that portion of a tract of land, the surface of which is owned by Haymond Maxwell, situate on Stone Coal Creek, in Hackers Creek District, Lewis County, West Virginia, bounded and described as follows:

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On the North by lands of Haymond Maxwell;

On the East by lands of Richard Harrison;

On the South by lands of John C. Childester and others;

On the West by lands of Fred Chittum and others,

containing about sixty acres of Red Stone coal to the outcrop (less amount heretofore mined and removed), and including as well the right heretofore granted to the Stone Coal Company by the said Haymond Maxwell to the use of five (5) acres of land for the erection of dwelling houses and other proper purposes, together with all the usual and necessary mining rights and privileges necessary or convenient to mine and remove said coal, and being the same coal, mining rights and privileges and interest in said five acres of land, as was conveyed to the Stone Coal Company by Haymond Maxwell and wife, by deed bearing date the 1st day of March, 1918, and of record in the Office of the Clerk of the County Court of Lewis County, West Virginia, in Deed Book No. 103, page 111, to which deed reference is made for a more accurate and definite description of said coal, mining rights and privileges intended herein to be conveyed; and which the said Stone Coal Company granted and conveyed to the said Diamond Fuel Company by deed dated August 24th, 1920, and recorded in the Clerk's office of the County Court of Lewis County, West Virginia in Deed Book No. 103, page 320.

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And the said Diamond Fuel Company for the consideration aforesaid, doth further grant, sell, assign and transfer to the said Charles S. Chestnut, his heirs and assigns, all the machinery, tippie, tracks, mine cars, side tracks and switches, live stock and all other equipment used or intended to be used in the operation of said coal plant;

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Exhibit No. 3.

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And for the consideration aforesaid the said Diamond Fuel Comapny doth assign, transfer and set over unto Charles S. Chestnut, his heirs and assigns for and during the unexpired term thereof, a certain lease for the mining, operation and removal of coal, executed by Louis Bennett and Sallie M. Bennett his wife, to the said Stone Coal Company, by an agreement made and entered into on the 28th day of February, 1918, and recorded in the office of the Clerk of the County Court of Lewis County, West Virginia in Deed Book No. 103, page 113, within and underlying a tract of 218.12 acres of land, and to which lease reference is made for a more accurate description of the terms thereof and a more accurate description of the land and coal therein contained; and which said lease by deed dated the 24th of August, 1920, and recorded in the office of the Clerk of the County Court of Lewis County, West Virginia, in Deed Book No. 103, page 320, the Stone Coal Company granted and conveyed unto the Diamond Fuel Company.

1038

It is further covenanted and agreed that the transfer and assignment of said lease and leasehold estate shall include and pass herewith any lease or leasehold estate which was subsequently acquired by the Stone Coal Company or the Diamond Fuel Company for the mining, operation and removal of said coal.

And for the consideration aforesaid, said Diamond Fuel Company does assign, transfer and set over to Charles S. Chestnut, his heirs and assigns, all of its right, title and interest in and to a certain contract made between the Monon-

Monongahela Valley Traction Company and the Stone Coal Company for the furnishing of electricity for light and power at said mine, together with all their right, title and interest in and to such sum or sums of money as may be due or become due to the Diamond Fuel Company under and by virtue of the terms of said contract payable monthly, which said contract made between the Monongahela Valley Traction Company and the Stone Coal Company was assigned and transferred to the Diamond Fuel Company under and by virtue of the aforesaid deed, dated August 24th, 1920, between the said Stone Coal Company and the said Diamond Fuel Company.

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The Diamond Fuel Company covenants that it is seized of an estate in fee simple in the real estate and rights herein conveyed that the said real estate and property herein conveyed is free from encumbrances except vendor's lien to the Stone Coal Company and that it has the right to convey the same.

To have and to hold the said premises, real, personal and mixed herein before described unto the said Charles S. Chestnut, his heirs and assigns forever.

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In Witness Whereof, the Diamond Fuel Company has caused its name to be signed hereto by its President and its corporate seal duly attested, to be hereto affixed the day and year first above written.

DIAMOND FUEL COMPANY,

By HENRY P. BOPE,

Its President.

(Seal)

Attest the corporate seal
of Diamond Fuel Company.

By GARDNER YERKES,

Its Secretary.

1042

Exhibit No. 3.

State of New York,
County of New York, to-wit:

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I, FRANK E. STRIPE, a Notary Public of the said County of New York, do certify that H. P. Bope personally appeared before me in my said County, and being by me duly sworn, did depose and say that he is President of Diamond Fuel Company, the corporation described in the writing hereto annexed, bearing date the 27th day of November, 1920, authorized by said Diamond Fuel Company to execute and acknowledge deeds and other writings of said Diamond Fuel Company, and that the seal affixed to said writing is the corporate seal of said Diamond Fuel Company, and that said writing was signed and sealed by him in behalf of said Diamond Fuel Company by its authority duly given. And the said H. P. Bope acknowledged the said writing to be the act and deed of said Diamond Fuel Company.

Given under by hand and official seal this 27th day of November, 1920.

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FRANK E. STRIPE,
Notary Public of, in and for the
County of New York and State
of New York.

My Comission expires the 30th day
of March, 1922.

Exhibit No. 3.

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The State of West Virginia,
Clerk's Office, County Court, Lewis County, } ss.:

November 30th, 1920.

The foregoing deed, stamped together with
the certificate thereto, annexed was this day pre-
sented in said office and admitted to record.

Attest:

LEANDER TROXELL,

Clerk. 1046

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EXHIBIT NO. 4.

THIS DEED made this seventh day of January, 1921, by and between CHARLES S. CHESTNUT, of the City of Philadelphia and State of Pennsylvania, and MAUD M. his wife, parties of the first part, and BARBOUR LEWIS COAL COMPANY, a corporation organized under the laws of the State of West Virginia, of the second part:

1049 WHEREAS by deed dated the 27th day of Nov. 1920, and recorded in the Clerk's Office, County Court, Lewis County, in the State of West Virginia, in Deed Book 103, page 378, the Diamond Fuel Company conveyed unto the said Charles S. Chestnut, his heirs and assigns, with covenants of General Warranty, all of the unmined Red Stone stratum of coal within and underlying that portion of a tract of land, the surface of which is owned by Haymond Maxwell, situate on Stone Coal Creek, in Hacker's Creek District, Lewis County, West Virginia, bounded and described as follows:

1050 On the North by lands of Haymond Maxwell;

On the East by lands of Richard Harrison;

On the South by lands of John C. Chidester and others;

On the West by lands of Fred Chittum and others;

containing about sixty acres of Red Stone coal to the outcrop (less amount heretofore mined

Exhibit No. 4.

1051

and removed), and including as well the right heretofore granted to the Stone Coal Company by the said Haymond Maxwell to the use of five (5) acres of land for the erection of dwelling houses and other proper purposes, together with all the usual and necessary mining rights and privileges necessary or convenient to mine and remove said coal, and being the same coal, mining rights and privileges and interest in said five acres of land, as was conveyed to the Stone Coal Company by Haymond Maxwell and wife, by deed bearing date the 1st day of March, 1918, and of record in the Office of the Clerk of the County Court of Lewis County, West Virginia, in Deed Book No. 103, page 111, to which deed reference is made for a more accurate and definite description of said coal, mining rights and privileges intended herein to be conveyed; and which the said Stone Coal Company granted and conveyed to the said Diamond Fuel Company by deed dated August 24th, 1920, recorded in the Clerk's Office of the County Court of Lewis County, West Virginia, in Deed Book No. 103, page 320;

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And by said deed further granted, sold, assigned and transferred to the said Charles S. Chestnut, his heirs and assigns, all the machinery, tipples, tracks, mine cars, side tracks and switches, live stock and all other equipment used or intended to be used in the operation of said coal plant;

And by said Deed did further convey unto the said Charles S. Chestnut his heirs and assigns, for and during the unexpired term thereof, a certain lease for the mining, operation and re-

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Exhibit No. 4.

removal of coal, executed by Louis Bennett and Sallie M. Bennett, his wife, to the said Stone Coal Company, by an agreement made and entered into on the 28th day of February, 1918, and recorded in the office of the Clerk of the County Court of Lewis County, West Virginia, in Deed Book No. 103, page 113, within and underlying a tract of 218.12 acres of land, and to which lease reference is made for a more accurate description of the terms thereof and a more accurate description of the land and coal therein contained; and which said lease by deed dated the 24th of August, 1920, and recorded in the office of the Clerk of the County Court of Lewis County, West Virginia, in Deed Book No. 103, page 320, the Stone Coal Company granted and conveyed unto the Diamond Fuel Company; and in said deed the Diamond Fuel Company further covenanted that the transfer and assignment of said lease and leasehold estate shall include and pass herewith any lease or leasehold estate which was subsequently acquired by the Stone Coal Company or the Diamond Fuel Company for the mining, operation and removal of said coal.

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And by said deed the said Diamond Fuel Company further assigned, transferred and set over unto the said Charles S. Chestnut, his heirs and assigns, all of its right, title and interest in and to a certain contract made between the Monongahela Valley Traction Company and the Stone Coal Company for the furnishing of electricity for light and power at said mine, together with all their right, title and interest in and to such sum or sums of money as may be

due or become due to the Diamond Fuel Company under and by virtue of the terms of said contract payable monthly, which said contract made between the Monongahela Valley Traction Company and the Stone Coal Company was assigned and transferred to the Diamond Fuel Company under and by virtue of the aforesaid deed, dated August 24th, 1920, between the said Stone Coal Company and the said Diamond Fuel Company.

NOW THIS DEED WITNESSETH that for and in consideration of the sum of One Dollar lawful money of the United States of America, unto them in hand paid at and before the sealing and delivery of these presents and for other valuable considerations unto them moving, the receipt whereof is hereby acknowledged, the said parties of the first part do give, grant, bargain, sell and convey to the said Barbour Lewis Coal Company, its successors and assigns, with covenants of special warranty all of the above described unmined Red Stone stratum of coal within and underlying that portion of a tract of land, the surface of which is owned by Haymond Maxwell, situate on Stone Coal Creek, in Hacker's Creek District, Lewis County, West Virginia, bounded and described as follows:

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On the North by lands of Richard Maxwell;

On the East by lands of Richard Harrison;

On the South by lands of John C. Chidester and others;

On the West by lands of Fred Chittum and others;

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Exhibit No. 4.

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containing about sixty acres of Red Stone coal to the outcrop (less amount heretofore mined and removed), and including as well the right heretofore granted to the Stone Coal Company by the said Haymond Maxwell to the use of five (5) acres of land for the erection of dwelling houses and other proper purposes, together with all the usual and necessary mining rights and privileges necessary or convenient to mine and remove said coal, and being the same, coal, mining rights and privileges and interest in said five acres of land, as was conveyed to the Stone Coal Company by Haymond Maxwell and wife, by deed bearing date the 1st day of March, 1918, and of record in the office of the Clerk of the County Court of Lewis County, West Virginia, in Deed Book No. 103, page 111, to which deed reference is made for a more accurate and definite description of said coal, mining rights and privileges intended herein to be conveyed; and which the said Stone Coal Company granted and conveyed to the said Diamond Fuel Company by deed dated August 24, 1920, and recorded in the Clerk's Office of the County Court of Lewis County, West Virginia in Deed Book No. 103, page 320.

And the said parties of the first part for the consideration aforesaid do further grant, sell, assign and transfer unto the said Barbour Lewis Coal Company, its successors and assigns, all the machinery, tippie, tracks, mine cars, side track and switches, live stock and all other equipment used or intended to be used in the operation of said coal plant;

And for the further consideration aforesaid the said parties of the first part do assign, transfer and set over unto the said Barbour Lewis Coal Company, its successors and assigns for and during the unexpired term thereof, a certain lease for the mining, operation and removal of coal, executed by Louis Bennett and Sallie M. Bennett, his wife, to the said Stone Coal Company, by an agreement made and entered into on the 28th day of February, 1918, and recorded in the office of the Clerk of the County Court of Lewis County, West Virginia in Deed Book No. 103, page 113, within and underlying a tract of 218.12 acres of land, and to which lease reference is made for a more accurate description of the terms thereof and a more accurate description of the land and coal therein contained; and which said lease by deed dated the 24th of August, 1920, and recorded in the office of the Clerk of the County Court of Lewis County, West Virginia, in Deed Book No. 103, page 320, the Stone Coal Company granted and conveyed unto the Diamond Fuel Company.

1064

It is further covenanted and agreed that the transfer and assignment of said lease and leasehold estate shall include and pass herewith any lease or leasehold estate which was subsequently acquired by the Stone Coal Company or the Diamond Fuel Company for the mining, operation and removal of said coal, which has been acquired by the said Charles S. Chestnut;

1065

And for the consideration aforesaid the said parties of the first part do assign, transfer and set over unto the said Barbour Lewis Coal Com-

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Exhibit No. 4.

1067

pany, its successors and assigns all of their right, title and interest in and to a certain contract made between the Monongahela Valley Traction Company and the Stone Coal Company for the furnishing of electricity for light and power at said mine, together with all their right, title and interest in and to such sum or sums of money as may be due or become due to the Diamond Fuel Company under and by virtue of the terms of said contract payable monthly, which said contract made between the Monongahela Valley Traction Company and the Stone Coal Company was assigned and transferred to the Diamond Fuel Company under and by virtue of the aforesaid deed, dated August 24th, 1920, between the said Stone Coal Company and the said Diamond Fuel Company.

TO HAVE AND TO HOLD the said premises, real, personal and mixed, hereinbefore described, unto the said Barbour Lewis Coal Company, its successors and assigns forever.

1068 IN WITNESS WHEREOF the said parties of the first part have hereunto set their hands and seals the day and year first above written.

CHARLES S. CHESTNUT.

MAUD M. CHESTNUT.

Sealed and delivered in
the presence of us

ALPHEW B. RUE.

S. KURTZ HANGLEY.

State of Pennsylvania, }
 County of Philadelphia, } ss.:

1069

I, W. ANNESLEY, a Notary Public for the State of Pennsylvania, residing in the City and County of Philadelphia, do certify that Charles S. Chestnut and Maud M. Chestnut his wife, whose names are signed to the writing above, bearing date the 7th day of January, 1921, have this day acknowledged the same before me in my said County.

Given under my hand this 21st day of January, 1921.

1070

W. ANNESLEY,
 Notary Public,
 Commission expires at end of
 Next Session of the Senate.

The State of West Virginia, }
 Clerk's Office, County Court, Lewis County, } ss.:

February 7th, 1921.

The foregoing deed, stamped, together with the certificate thereto annexed was this day presented in said office and admitted to record.

1071

Attest:

LEANDER TROXELL,
 Clerk.

1072

EXHIBIT NO. 5.

THIS DEED, made this 27th day of November, A. D., 1920, between Diamond Fuel Company, a corporation organized under the laws of the State of Delaware, party of the first part, and Charles S. Chestnut of the City of Philadelphia in the State of Pennsylvania, party of the second part.

1073

WITNESSETH: That the said Diamond Fuel Company for and in consideration of the sum of One Dollar (\$1.00) lawful money of the United States of America unto it in hand paid at and before the sealing and delivery of these presents and for other valuable considerations unto it moving, the receipt whereof is hereby acknowledged, doth give, grant, bargain, sell and convey unto Charles S. Chestnut his heirs and assigns, with covenants of general warranty all of those certain tracts or parcels of land, coal in fee, mining plant, equipment, machinery, merchandise and all personal property owned by said Diamond Fuel Company at its plant at Arden, in Barbour County, West Virginia, which is described as follows:

1074

First: That certain tract or parcel of land situated near the station of Arden on the Grafton and Belington Division of the Baltimore and Ohio Railroad Company in the County of Barbour, State of West Virginia, and being the same tract or parcel of land conveyed to George C. Lee by Adam Trimbley and wife by deed dated the 1st day of September, 1896, which is bound-

ed and described as follows: Beginning at a point in the right of way opposite a white oak stump corner to original survey on Drusilla Robinson and Adam Trimbley, thence S. 50° E. Sixty-eight poles to a maple and apple, Robinson and Duskworth corner, thence EIGHT 20½ degrees E. 15 poles and 12 links to a walnut in Allen Carpenters corner, thence S. 5 degrees W. 40 poles and 20 links to a gum in Allen Carpenter's line at a gate, thence N. 88 degrees W. 56 poles and 8 links to a hickory stump in the edge of the road, thence S. 87 degrees W. 3 poles to the said right of way, thence with the said right of way to the beginning, the said Adam Trimbley having reserved two acres of the surface in said conveyance to said Lee; and now owned by the Diamond Fuel Company.

1076

Second: The coal underlying the sixty-four acres and 117 poles of land conveyed to said George C. Lee by Frank Duckworth and wife by deed dated the 28th day of June, 1898, and to which deed reference is hereby made for a more complete description of said boundary; and now owned by the Diamond Fuel Company.

1077

Third: The coal underlying the sixty-three acres and 101 poles of land conveyed to the said George C. Lee by James Lawless and wife by deed dated the 28th day of June, 1899 and to which deed reference is here made for a complete description of said boundary; and now owned by the Diamond Fuel Company.

1078

Exhibit 5.

Fourth: The coal underlying the sixty-four acres and 17 poles land conveyed to said George C. Lee by Drusilla Robinson and others by deed dated the 28th day of June, 1899, to which deed reference is hereby made for a complete description of said boundary; and now owned by the Diamond Fuel Company.

1079

Fifth: The coal underlying the one hundred and fifteen acres of land conveyed to the said George C. Lee by Allen Carpenter and wife by a deed dated the 28th day of June, 1899, to which deed reference is hereby made for a complete description of said boundary; and now owned by the Diamond Fuel Company.

Sixth: The coal underlying the one hundred and eight acres of land conveyed to the said George C. Lee by Samuel Streets and wife, by deed dated the 28th day of June 1899, to which deed reference is hereby made for a more complete description of said boundary; and now owned by the Diamond Fuel Company.

1080

Seventh: All that certain stratum or vein of coal called the "six foot vein" underlying the land owned by Matilda Ritter and adjoining the above tracts on the east conveyed by Matilda Ritter and her husband to Samuel W. Shrader by deed dated May 9th, 1900, of record in the office of the Clerk of the County Court of the said Barbour County in Deed Book 45, pages 68 to 70, containing one hundred and fifty-four acres of coal, more or less, to which deeds

reference is hereby made for a complete description; and now owned by the Diamond Fuel Company.

Eighth: All the coal within and underlying that certain tract of land situate on the waters of Laurel Creek, in Barbour County, West Virginia, containing forty acres, more or less, it being the first two tracts of land conveyed to the Tygarts River Coal Company by Godfrey Streets and wife by a deed dated August 1st, 1902, and recorded in said County Clerk's Office in Deed Book 52, page 248; and now owned by the Diamond Fuel Company. 1082

Together with the mining rights and privileges granted and conveyed in the above mentioned conveyances, excepting, however, the coal that has been mined and removed from said lands, and the following described improvements and personal property on said property, to wit:

1 hoisting engine at tipple, 1 Boll engine, generator switch board, fittings installed, 1 compressor 150 H. P. 2 boilers, setting and piping, 1 clock, 3 sets heaters, 3 oil tanks, extra flue for boiler, compressor tank, 250 ft. 4" air line, 1 receiver tank, 1 lot miscellaneous mine supplies, 1 stretcher, 2 oil blankets, 1 Eagle fan and engine, 1 feed box, 1 barn, 1 power house, 1 blacksmith shop, 1 supply house, 1 fan house, 1 motor house, 1 check house, 1 sand house, 1 powder magazine, 1 shanty four rooms, 6 dwelling houses, 10 dwelling houses, 1 tipple, 1 house, 1 house, 1 store building, 1 motor General Electric Anemometer, 1083

1024

Exhibit No. 5.

1 Davey safety lamp, 1 Compass, 1 chain hoist, 2 jacks, mine machine hose, 5 Harrison, 3-G punching machines, 1 machine truck, 51 mine cars, 50 mine hitchings, 1 Ingersoll rock drill, 1 haulage engine, steel rail in mine, trolley wire in mine, 700 feet feed wire, 1 pump, 150 ft. 5" pipe, 725 ft. 4" pipe, and all other air line in mine, mine siding complete.

1085

1 Morgan-Garnder Mining Machine, 1 Lot Office Furniture, 7 Mules, 89 mine cars, 67 Tons 40 lb. Rails laid in mine, 30 tons 20 and 25 lb. Rails, 36 Sacks Cement, 42 Kegs Powder, 25 lbs. Permissible Explosives, 2 Snow Pumps, 1 Mine Fan, 1 Mine Scale, about 12,000 ft. of Lumber, entire stock of merchandise in store and fixtures, being the same property which was conveyed to Clarence D. Robinson, trustee in bankruptcy of the estate of Initial Fuel Company by May Day Coal Company, a corporation, by deed dated the 2nd day of January, 1917, and of record in the office of the Clerk of the County of Barbour, West Virginia, in Deed Book No. 88, page 318; and which said property the said

1086

Clarence D. Robinson, as trustee in bankruptcy aforesaid by deed dated the 2nd day of August, 1919 and recorded in the office of the County Clerk of Barbour County, West Virginia in Deed Book No. 95, page 275; granted and conveyed to the said Diamond Fuel Company; and also all other personal property acquired by the Diamond Fuel Company from Clarence D. Robinson as trustee in bankruptcy of the estate of Initial Fuel Company as appears from

Exhibit No. 5.

1087

the report of sale which the said Trustee filed on August 1st, 1919, to which deed and report of sale reference is hereby expressly made for a more complete description of the property hereby conveyed; and also all other personal property of every kind of character since acquired and used by the Diamond Fuel Company in and about the mining of coal on the said premises herein before described.

There is reserved and excepted from this conveyance, however, those two certain acres of land, lying on the Tygarts Valley River adjoining the land of S. V. Woods and others, situate in Philippi District, Barbour County, West Virginia, conveyed by said May Day Coal Company to Mertie Haller by deed dated September 25th, 1915, recorded in the office of the Clerk of the County Court of Barbour County, West Virginia, in Deed Book No. 85, page 110, but expressly giving and granting hereby to Charles S. Chestnut his heirs and assigns the coal and mining rights and privileges reserved in said deed.

1088

This conveyance is made subject also to the lease of 32½ acres made by May Day Coal Company to L. B. Brydon dated on the 14th day of March, 1916, as modified by memorandum of agreement entered into on the 24th day of January, 1917, the said Diamond Fuel Company giving and granting unto Charles S. Chestnut his heirs and assigns, all the rents, royalties, rights and privileges reserved by the grantor in said lease and modification thereof.

1089

1090

Exhibit No. 5.

To have and to hold the said premises, real, personal and mixed herein before described unto the said Charles S. Chestnut his heirs and assigns forever.

In Witness Whereof the Diamond Fuel Company has caused its name to be signed hereto by its President and its corporate seal duly attested by its Secretary to be hereto affixed the day and year first above written.

1091

DIAMOND FUEL COMPANY,
By Henry P. Bope,
Its President.

Attest the corporate seal
of Diamond Fuel Company.

By GARDNER YERKES,
Its Secretary.

(Corporate Seal)

1092

State of New York,
County of New York, to wit:

I, FRANK E. STRIPE, a Notary Public of the said County of New York, do certify that H. P. BOPE personally appeared before me in my said County, and being by me duly sworn, did depose and say that he is President of Diamond Fuel Company, the corporation described in the writing hereto annexed, bearing date the 27th day of November, 1920, authorized by said Diamond Fuel Company to execute and acknowledge deeds and other writings of said Diamond Fuel Company, and that the seal affixed to said

Exhibit No. 5.

1093

writing is the corporate seal of said Diamond Fuel Company, and that said writing was signed and sealed by him in behalf of said Diamond Fuel Company by its authority duly given. And the said H. P. Bope acknowledged the said writing to be the act and deed of said Diamond Fuel Company.

Given under my hand and official seal this 27th day of November, 1920.

FRANK E. STRIPE

1094

Notary Public of, in and for the
County of New York, and State of
New York.

My commission expires the 30 day of March,
1922.

(Seal)

The State of West Virginia,

Barbour County Court Clerk's Office Nov. 30th, 1920. The foregoing Deed and certificate of acknowledgment thereto annexed were this day presented in said office and on motion of Charles S. Chestnut duly admitted to record in Deed Book No. 94 page 114. 1095

Attest: S. F. HOFFMAN,
Clerk.

1096

EXHIBIT NO. 8.

THIS DEED made this seventh day of January, 1921, between CHARLES S. CHESTNUT, of the City of Philadelphia, and MAUD M. his wife, parties of the first party, and BARBOUR LEWIS COAL COMPANY, a corporation organized under the laws of the State of West Virginia, party of the second part.

1097

WHEREAS, by deed dated the 27th day of November 1920, and recorded in the Clerk's Office, County Court, Barbour County in the State of West Virginia, in Deed Book 94, page 114 &c., the Diamond Fuel Company conveyed unto the said Charles S. Chestnut, his heirs and assigns, with covenants of General Warranty, all those certain tracts or parcels of land, coal in fee, mining plant, equipment, machinery, merchandise and all personal property owned by the Diamond Fuel Company at its plant at Arden, in Barbour County, West Virginia, as in said deed more particularly described.

1098

NOW THIS DEED WITNESSETH, that the said parties of the first part, for and in consideration of the sum of One Dollar lawful money of the United States of America, unto them in hand paid at and before the sealing and delivery of these presents and for other valuable considerations unto them moving, the receipt whereof is hereby acknowledged, do give, grant, bargain, sell and convey unto the said Barbour-Lewis

Coal Company, its successors and assigns, with covenants of Special Warranty, all those certain tracts or parcels of land, coal in fee, mining plant, equipment, machinery, merchandise and all other personal property owned by the said parties of the first part at their plant at Arden, in Barbour County, West Virginia, which is described as follows:

First: That certain tract or parcel of land situated near the station of Arden on the Grafton and Belington Division of the Baltimore and Ohio Railroad Company in the County of Barbour, State of West Virginia, and being the same tract or parcel of land conveyed to George C. Lee by Adam Trimbley and wife by deed dated the 1st day of September, 1896, which is bounded and described as follows: Beginning at a point in the right of way opposite a white oak stump corner to original survey on Drusilla Robinson and Adam Trimbley, thence S. 50° E. sixty-eight poles to a maple and apple, Robinson and Duckworth corner, thence Eight 20½ degrees E. 15 poles and 12 links to a walnut in Allen Carpenter's corner, thence S. 5 degrees W. 40 poles and 20 links to a gum in Allen Carpenter's line at a gate, thence N. 88 degrees W. 56 poles and 3 links to a hickory stump in the south edge of the road, thence S. 87 degrees W. 3 poles to the said right of way, thence with the said right of way to the beginning, the said Adam Trimbley having reserved two acres of the surface in said conveyance to said Lee; and now owned by the parties of the first part.

1100

1101

1102

Exhibit No. 6.

Second: The coal underlying the sixty-four and 117 poles of land conveyed to said George C. Lee by Frank Duckworth and wife by deed dated the 28th day of June, 1898, and to which deed reference is hereby made for a more complete description of said boundary; and now owned by the parties of the first part.

1103

Third: The coal underlying the sixty-three acres and 101 poles of land conveyed to the said George C. Lee by James Lawless and wife by deed dated the 28th day of June, 1899, and to which deed reference is here made for a complete description of said boundary; and now owned by the parties of the first part.

Fourth: The coal underlying the sixty-four acres and 17 poles land conveyed to said George C. Lee by Drusilla Robinson and others by deed dated the 28th day of June, 1899, to which deed reference is hereby made for a complete description of said boundary; and now owned by the parties of the first part.

1104

Fifth: The coal underlying the one hundred and fifteen acres of land conveyed to the said George C. Lee by Allen Carpenter and wife by a deed dated the 28th day of June, 1899, to which deed reference is hereby made for a complete description of said boundary; and now owned by the parties of the first part.

Sixth: The coal underlying the one hundred and eight acres of land conveyed to the said George C. Lee by Samuel Streets and wife, by

Exhibit No. 6.

1105

deed dated the 28th day of June, 1899, to which deed reference is hereby made for a more complete description of said boundary; and now owned by the parties of the first part.

Seventh: All that certain stratum or vein of coal called the "six foot vein" underlying the land owned by Matilda Ritter and adjoining the above tracts on the east conveyed by Matilda Ritter and her husband to Samuel W. Shrader by deed dated May 9th, 1900, of record in the office of the Clerk of the County Court of the said Barbour County, in Deed Book 45, pages 68 to 70; containing one hundred and fifty-four acres of coal, more or less, to which deed reference is hereby made for a complete description: and now owned by the parties of the first part.

1106

Eighth: All the coal within and underlying that certain tract of land situate on the waters of Laurel Creek, in Barbour County, West Virginia, containing forty acres, more or less, it being the first two tracts of land conveyed to the Tygarts River Coal Company by Godfrey Streets and wife by a deed dated August 1st, 1902, and recorded in said County Clerk's Office in Deed Book 52, page 248, and now owned by the parties of the first part.

1107

Together with the mining rights and privileges granted and conveyed in the above mentioned conveyances, excepting, however, the coal that has been mined and removed from said lands, and the following described improvements and personal property on said property, to wit:

1108

Exhibit No. 6.

1 hoisting engine at tippie, 1 Ball engine, generator switch board, fittings installed, 1 compressor 150 H. P. 2 boilers, setting and piping, 1 clock, 3 sets heaters, 3 oil tanks, extra flue for boiler, compressor tank, 250 ft. 4" air line, 1 receiver tank, 1 lot miscellaneous mine supplies, 1 stretcher, 2 oil blankets, 1 Eagle fan and engine, 1 feed box, 1 barn, 1 power house, 1 blacksmith shop, 1 supply house, 1 fan house, 1 motor house, 1 check house, 1 sand house, 1 powder magazine, 1 shanty four rooms, 6 dwelling houses, 10 dwelling houses, 1 tippie, 1 house, 1 house, 1 store building, 1 motor General Electric Annemometer, 1 Davy safety lamp, 1 Compass, 1 chain hoist, 2 jacks, mine machine hose, 5 Harrison, 3-G punching machines, 1 machine truck, 51 mine cars, 50 mine hitchings, 1 Ingersoll rock drill, 1 haulage engine, steel rail in mine, trolley wire in mine, 700 feet wire, 1 pump, 150 ft. 5" pipe, 725 ft. 4" pipe, and all other air line in mine, mine siding complete.

1110

1 Morgan-Garnder Mining Machine, 1 Lot Office Furniture, 7 Mules, 89 mine cars, 67 Tons 40 lb. Rails laid in mine, 30 tons 20 and 25 lb. Rails, 36 Sacks Cement, 42 Kegs Powder, 25 lbs. Permissible Explosives, 2 Snow Pumps, 1 Mine Fan, 1 Mine Scale, about 12,000 ft. of Lumber, entire stock of merchandise in store and fixtures, being the same property which was conveyed to Clarence D. Robinson, trustee in Bankruptcy of the Estate of Initial Fuel Company by May Day Coal Company, a corporation, by deed dated the 2nd day of January, 1917, and of record in the office of the Clerk of

Exhibit No. 6.

1111

the County of Barbour, West Virginia, in Deed Book No. 88, page 318; and which said property the said Clarence D. Robinson, as Trustee in bankruptcy aforesaid by deed dated the 2nd day of August, 1919, and recorded in the office of the County Clerk of Barbour County, West Virginia in Deed Book No. 95, page 275; granted and conveyed to the said Diamond Fuel Company; and also all other personal property acquired by the Diamond Fuel Company from Clarence D. Robinson as trustee in bankruptcy of the estate of Initial Fuel Company as appears from the report of sale which the said Trustee filed on August 1st, 1919, to which deed and report of sale reference is hereby expressly made for a more complete description of the property hereby conveyed; and also all other personal property of every kind and character since acquired and used by the Diamond Fuel Company or by the parties of the first part, in and about the mining of coal on the said premises hereinbefore described.

1112

There is reserved and excepted from this conveyance, however, those two certain acres of land, lying on the Tygarts Valley River adjoining the land of S. V. Woods and others, situate in Philippi District, Barbour County, West Virginia, conveyed by said May Day Coal Company to Mertie Haller by deed dated September 25th, 1915, recorded in the office of the Clerk of the County Court of Barbour County, West Virginia, in Deed Book No. 85, page 110, but expressly giving and granting hereby to Barbour Lewis Coal Company, its successors and assigns,

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Exhibit No. 6.

the coal and mining rights and privileges reserved in said deed.

1115

This Conveyance is made subject also to the lease of 32½ acres made by May Day Coal Company to L. B. Brydon dated the 14th day of March, 1916, as modified by memorandum of agreement entered into on the 24th day of January, 1917, the said parties of the first part, giving and granting unto the Barbour Lewis Coal Company, its successors and assigns, all the rents, royalties, rights, privileges reserved by the grantor in said lease and modification thereof.

To have and to hold the said premises, real, personal mixed hereinbefore described unto the said Barbour Lewis Coal Company, its successors and assigns forever.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first aforesaid.

1116

CHARLES S. CHESTNUT (L. S.)

MAUD M. CHESTNUT (L. S.)

Sealed and delivered in
the presence of

ALPHEW B. RUE.

S. KURTZ HANGLEY.

(Revenue Stamps)

State of Pennsylvania, }
 County of Philadelphia, } ss.:

I, W. ANNESLEY, a Notary Public for the State of Pennsylvania, residing in the City and County of Philadelphia, do certify that Charles S. Chestnut and Maud M. his wife, whose names are signed to the writing above, bearing date the 7th day of January 1921, have this day acknowledged the same before me in my said County.

1118

Given under my hand this 21st day of January 1921.

W. ANNESLEY,
 Notary Public,
 Commission expires at end of
 next Session of the Senate.

(Seal)

The State of West Virginia,

Barbour County Court Clerk's Office, Feb. 7, 1921. The foregoing Deed and certificate of acknowledgement thereto annexed were this day presented in said office and on motion of Barbour Lewis Coal Co. duly admitted to record in Deed Book No. 94, page 262.

1119

Attest: J. F. HEWITT,
 Clerk.

1120

EXHIBIT NO. 7.

THIS AGREEMENT Made this 27th day of November, A. D. 1920, between Diamond Fuel Company, a corporation organized under the laws of the State of Delaware, party of the first part, and Charles S. Chestnut of the City of Philadelphia and State of Pennsylvania, party of the second part.

WHEREAS, by a contract of sale made between
1121 the Volga Coal Company, a corporation organized under the laws of the State of West Virginia, and Wm. Moore of Fairmont, W. Va., which Contract was assigned to the said Diamond Fuel Company, the Volga Coal Company, agreed to grant, sell and convey unto the Diamond Fuel Company for the consideration of Thirty Thousand Dollars (\$30,000.) all the coal within and underlying certain tracts of land set forth in a draft of deed bearing date—day of July, 1920, between the Volga Coal Company and the Diamond Fuel Company, (a copy of which
1122 draft deed is attached hereto and made part hereof),

And, Whereas, by reason of certain defects of title and encumbrances of said property, and unencumbered unmarketable title to the said properties could not at that time be conveyed, whereby performance of the said contract of the sale was delayed; and,

Exhibit No. 7.

1123

Whereas, the Diamond Fuel Company entered into possession of the said premises and have since erected and constructed certain mining improvements thereon and have placed certain personal property therein and thereon for the purpose of mining coal; and,

Whereas, the Diamond Fuel Company desires to sell its rights under said contract of sale to the said Charles S. Chestnut; and the said Charles S. Chestnut is willing to purchase the same.

1124

NOW THIS AGREEMENT WITNESSETH: That the said Diamond Fuel Company for and in consideration of the sum of One Dollar (\$1.00) lawful money of the United States of America unto it in hand paid at and before the sealing and delivery of these presents, and for other valuable considerations unto it moving, the receipt whereof is hereby acknowledged, doth grant, bargain and sell unto the said Charles S. Chestnut his heirs and assigns, all and singular, its estate right title property claim and demand whatsoever, in law or in equity, in and to the said contract with the said Volga Coal Company for the purchase of the said property described in the said draft deed for the consideration therein named; and the said Diamond Fuel Company doth likewise grant, set over, assign and transfer unto the said Charles S. Chestnut his heirs and assigns, all trackage, side tracks, rights of way, tipples, mine cars, houses and structures of all kinds and character, mining equipment, animals, engines, machinery, appliances, supplies

1125

1126

Exhibit No. 7.

and each and every item of personal property and each and every item of mixed property and each and every fixture and appurtenance of every kind whatsoever whether herein specifically set forth or not, owned, erected or placed upon the said property by the said Diamond Fuel Company, upon, in or about the real estate and mining plant thereon, described and mentioned in the draft deed hereto annexed.

1127

And the said Diamond Fuel Company doth hereby assign to Charles S. Chestnut his heirs and assigns all its right, title and interest to any claim for breach of contract on the part of the said Volga Coal Company by reason of inability on the part of the Volga Coal Company to deliver an unencumbered unmarketable title to said premises.

In Witness Whereof the Diamond Fuel Company has caused its name to be signed hereto by its President and its corporate seal duly attested by its Secretary to be hereto affixed the day and year first above written.

1128

DIAMOND FUEL COMPANY,
By Henry P. Bope,
Its President.

Attest the corporate seal
of Diamond Fuel Company.

By GARDNER YERKES,
Its Secretary.

(Corporate Seal)

State of New York,
County of New York, to-wit:

I, FRANK E. STRIPE, a Notary Public of the said County of New York, do certify that H. P. Bope, personally appeared before me in my said County, and being by me duly sworn, did depose and say that he is President of Diamond Fuel Company, the corporation described in the writing hereto annexed, bearing date the 27th day of November 1920, authorized by said Diamond Fuel Company to execute and acknowledge deeds and other writings of said Diamond Fuel Company, and that the seal affixed to said writing is the corporate seal of said Diamond Fuel Company, and that said writing was signed and sealed by him in behalf of said Diamond Fuel Company by its authority duly given. And the said H. P. Bope acknowledged the said writing to be the act and deed of said Diamond Fuel Company.

1130

Given under my hand and official seal this 27th day of November, 1920.

1131

FRANK E. STRIPE,
Notary Public, of, in and for the
County of New York and State of
New York.
My Commission expires the 30th day
of March, 1922.

1132

Exhibit No. 7.

THIS DEED, Made this.....day of July, A. D., 1920, by and between Volga Coal Company, a corporation organized and existing under the laws of the State of West Virginia, and having its principal place of business in the city of Clarksburg and State of West Virginia, party of the first part,

AND

1133

Diamond Fuel Company, a corporation organized and existing under the laws of the State of Delaware, and having its principal place of business in the City of _____, county of _____ and state of West Virginia, party of the second part,

WITNESSETH, That for and in consideration of the sum of Thirty Thousand (\$30,000.00) Dollars, payable in the following form and manner:

1134

Ten Thousand (\$10,000.00) Dollars in cash upon the delivery hereof, the receipt whereof is hereby acknowledged and the remaining Twenty Thousand (\$20,000.00) Dollars to be secured by four (4) certain promissory notes of the said party of the second part, each in the sum of Five Thousand (\$5,000.00) Dollars and payable respectively in six (6) twelve (12) eighteen (18) and twenty-four (24) months from the date hereof, with interest thereon at the rate of six per cent. (6%) per annum, payable to the said party of the first part, to secure the payment of which said notes on vendor's lien is hereby re-

tained on the real estate hereby conveyed, do hereby grant, sell and convey unto the said party of the second part, its successors and assigns, with covenant of general warranty, subject to reservations and exceptions hereinafter contained,

ALL the coal within and underlying two (2) certain tracts and parcels of land situate in Union District, Barbour County, West Virginia, on the waters of Buckhannon River, and hereinafter more fully set out and described, together with the right to mine and remove all of said coal, upon, in and under the two (2) said tracts of land, including the right to enter upon and under said land to mine and remove all of said coal, and to remove upon and under said land the coal from and under other lands co-terminus and contiguous thereto, together with all necessary and convenient rights-of-way through and under said land, with drainage, ventilation and ventilating shafts to remove the coal from neighboring lands, hereby waiving all damages arising therefrom, said tracts and parcels of land being described as follows: 1136 1137

First Tract: Beginning at a corner of Kerr and Rohr; thence with Kerr's line South, 31° 20' West, fifteen hundred four and four tenths (1504.4) feet to a stone; thence South, 33° 50' West, ten hundred and fifteen and five tenths (1015.5) feet to a stone; South 46° East, five hundred twenty-nine and six tenths (529.6) feet to a stone in road, corner of Charles Reger,

1138

Exhibit No. 7.

1139

1140

thence with road South, $52^{\circ} 30'$ West, two hundred (200) feet in road; South, $66^{\circ} 50'$ West, one hundred and seventy-two (172) feet in road; thence South, $17^{\circ} 40'$ East, two hundred ninety-one and seven tenths (291.7) feet thence South, $14^{\circ} 50'$ West, four hundred five (405) feet to a stone; to a stone; thence South, $67^{\circ} 45'$ East, four hundred one and nine tenths (401.9) feet to an oak on the bank of the Buckhannon River; and thence down the same North, 11° East, two hundred thirty-three and five tenths (233.5) feet; North $29^{\circ} 30'$ East, two hundred forty-five (245) feet; North $50^{\circ} 10'$ East, two hundred sixty-six (266) feet; North, $42^{\circ} 30'$ East, two hundred eighty-nine and two tenths (289.2) feet; North, $53^{\circ} 10'$ East, nine hundred seventy (970) feet to a white oak, corner of Teter; thence leaving the river North, $21^{\circ} 30'$ West, two hundred six and three tenths (206.3) feet to the center of the road by an ash oak; thence South, $89^{\circ} 10'$ East, three hundred forty-one and eight tenths (341.8) feet to a stake in the road; thence South, 87° East, one hundred twenty-eight and seven tenths (128.7) feet to a stake in road; thence North, $9^{\circ} 30'$ East, six hundred forty-five and two tenths (645.2) feet to a lynn; thence North, 10° West, eleven hundred sixteen (1116) feet to a stake on the North side of Big Run; thence North 77° West, seven hundred fifty-five and four tenths (755.4) feet to the beginning. Containing ninety-three and three hundred ninety-one thousandths (93.391) acres.

But the party of the first part excepts and reserves from this conveyance four and two

Exhibit No. 7.

1141

hundred one thousandths (4.201) acres thereof, which has heretofore been conveyed to the Point Pleasant & Tygarts Valley Railroad Company by deed dated on the 16th day of May, 1900, and of record in the Clerk's Office of the County Court of Barbour County, in Deed Book No. 45, Page 59, to deed reference is made for a description thereof, leaving a net acreage of eighty-nine and nineteen hundredths (89.19) acres, be the same more or less.

There is expressly reserved and excepted as to said coal within and underlying this tract of land the right to drill through said coal and operate for oil and gas, but no drilling shall be done in the main opening of any mines.

1142

SECOND TRACT: Beginning at a stake on the East side of the county road, a corner to Barrett's land, and running thence South $85\frac{3}{4}^{\circ}$ East, twenty-eight and nineteen hundredths (28.19) poles to a stake; thence South, $31^{\circ} 35'$ West, crossing the county road, Big Run and the B. & O. Railroad, ninety-two and eighteen hundredths (92.18) poles to a stone, corner to Marshall Reger's land; thence North $41^{\circ} 42'$ West, forty and seven tenths (40.7) poles to a stone; thence North, $88\frac{3}{4}^{\circ}$ East, twelve (12) poles to a stone; thence North, $41\frac{1}{2}^{\circ}$ East, crossing said railroad, run and county road, seventy-two (72) poles to a stone in Barrett's line; thence with this line South, $53^{\circ} 33'$ East, thirty-seven and seventy-five hundredths (37.75) poles to the place of beginning. Containing twenty-one and one tenth (21.1) acres, less one and nine hundred thirty-three thousandths (1.933) acres

1143

1144

Exhibit No. 7.

now owned and occupied by the Baltimore & Ohio Railroad Company, a corporation.

It is expressly understood and agreed that the right is hereby reserved to the party of the first part and its grantors, to drill through said coal and operate for oil and gas, but drilling shall not be done in the main opening of any mine.

1145

Being the same premises conveyed to the Volga Coal Company by deed of Louis A. Henderson and wife, et al., dated April 7, 1917, and recorded in Deed Book 88, Page 405.

Also a certain tract or parcel of surface land in said Union District in said county, being a part of the said tract of land mentioned and described in the deed hereinbefore recited, and being that part thereof lying around the mine openings, containing one (1) acre, more or less, and being more particularly bounded and described as follows, to wit:

1146

Beginning at a stake on line of lands of William R. Reager and line of right-of-way of Baltimore & Ohio Railroad, at the point where same crosses Reager's line; thence along right-of-way East, four hundred (400) feet to land of S. E. House; thence along land of said House in a Southeasterly direction, one hundred twelve (112) feet to a stake; thence along other lands now or formerly of Sarah E. House and others in Southwesterly direction, two hundred fifty-six (256) feet to a stake; thence along the same in a Westerly direction, two hundred eighty-six and

Exhibit No. 7.

1147

one-half (286½) feet to corner of land of William R. Reager; thence along land of said Reager in a Northeasterly direction, fifty-four (54) feet to the place of beginning.

Being the same premises conveyed to the said Volga Coal Company by deed of Sarah E. House et al, dated May 28, 1919, and recorded in Deed Book 91, Page 193.

IN WITNESS WHEREOF the said party of the first part has caused this deed to be signed in its corporate name by its President, its corporate seal to be hereunto affixed and attested by its Secretary the day and year first above written.

1148

VOLGA COAL COMPANY,

By _____
President.

Attest:

Secretary.

1149

1150

Exhibit No. 7.

State of Pennsylvania, }
 County of Fayette, }ss.:

1151

I, _____, a Notary Public of said County of Fayette and State of Pennsylvania, do hereby certify that _____, personally appeared before me in my said county, and being by me duly sworn did depose and say that he is the President of the corporation described in the writing hereto attached, bearing date, the ____ day of July, 1920, authorized by said corporation to execute and acknowledge deeds or papers of said corporation; and that the seal affixed to said writing is the corporate seal of said corporation; and that the said writing was signed and sealed by him in behalf of said corporation by its authority, duly given; and that the said _____ acknowledged the said deed to be the act and deed of the said corporation.

WITNESS my hand and Official seal this _____ day of July, A. D. 1920.

1152

 Notary Public.
 My Commission expires _____

EXHIBIT NO. 8.

1153

THIS DEED made this seventh day of January, 1921, by and between CHARLES S. CHESTNUT, of the City of Philadelphia and State of Pennsylvania, and MAUD M. his wife, parties of the first part, and BARBOUR LEWIS COAL COMPANY, a corporation organized under the laws of the State of West Virginia, of the second part;

WHEREAS by an agreement dated the 27th day of November, 1920, the Diamond Fuel Company conveyed unto the said Charles S. Chestnut, his heirs and assigns, all its estate, right, title, property, claim and demand whatsoever, in law or in equity, in and to a certain contract of sale between the Volga Coal Company and William Moore, of Fairmont, West Virginia for all of the coal within and underlying certain tracts of land; and which said contract the said William Moore assigned to the Diamond Fuel Company.

1154

NOW THIS AGREEMENT WITNESSETH, that the parties of the first part for and in consideration of the sum of One Dollar, lawful money of the United States of America unto them in hand paid at and before the sealing and delivery of these presents, and for other valuable considerations unto them moving, the receipt whereof is hereby acknowledged, do grant, bargain and sell unto the said Barbour Lewis Coal Company, its successors and assigns all and singular the estate, right, title, property, claim and demand whatsoever in law or in equity of the said parties of the first part in and to the said contract with the Volga Coal Company for the purchase of the said property as set forth in a draft of deed bearing date the day of July, 1920, between the Volga Coal Company and the Diamond Fuel Company (a copy of which draft deed is attached hereto and made part hereof);

1155

1156

Exhibit No. 8.

And the said parties of the first part do likewise grant, set over and assign unto the said Barbour Lewis Coal Company, its successors and assigns, all trackage, side tracks, rights of way, tipples, mine cars, houses and structures of all kinds and character, mining equipment, animals, engines, machinery, appliances, supplies and each and every item of personal property and each and every item of mixed property and each and every fixture and appurtenance of every kind whatsoever, whether in herein specifically set forth or not, owned, erected or placed upon the said property by the said Diamond Fuel Company, upon, in or about the real estate and mining plant thereon described and mentioned in the draft deed hereto annexed.

1157

And the said parties of the first part do hereby assign to the said Barbour Lewis Coal Company, its successors and assigns, all their right, title and interest to any claim for breach of contract on the part of the said Volga Coal Company by reason of inability on the part of the Volga Coal Company to deliver an unencumbered, unmarketable title to said premises.

1158

IN WITNESS WHEREOF, the parties of the first part have hereunto set their hands and seals the day and year first aforesaid.

CHARLES S. CHESTNUT.
MAUD M. CHESTNUT.

Sealed and delivered in
the presence of
ALPHEW B. RUE.
S. KURTZ HANGLEY.

State of Pennsylvania, }
County of Philadelphia, } ss. :

I, W. ANNESLEY, a Notary Public for the State of Pennsylvania, residing in the City and County of Philadelphia, do certify that Charles S. Chestnut and Maud M. Chestnut, his wife, whose names are signed to the writing above, bearing date the 7th day of January, 1921, have this day acknowledged the same before me in my said County.

1160

Given under my hand this 21st day of January, 1921.

W. ANNESLEY,
Notary Public,
Commission expires at end of
next Session of the Senate.

1161

1162

Exhibit No. 8.

1163

THIS DEED, made this day of July, A. D. 1920, by and between Volga Coal Company, a corporation organized and existing under the laws of the State of West Virginia, and having its principal place of business in the City of Clarksburg and State of West Virginia, party of the first part, and Diamond Fuel Company, a corporation organized and existing under the laws of the State of Delaware, and having its principal place of business in the city of county of and state of West Virginia, party of the second part.

WITNESSETH, That for and in consideration of the sum of Thirty thousand (\$30,000.00) Dollars, payable in the following form and manner:

1164

Ten thousand (\$10,000.00) Dollars in cash upon the delivery hereof, the receipt whereof is hereby acknowledged, and the remaining Twenty thousand (\$20,000.00) Dollars to be secured by four (4) certain promissory notes of the said party of the second part, each in the sum of Five thousand (\$5,000.00) Dollars, and payable respectively in six (6), twelve (12), eighteen (18) and twenty-four (24) months from the date hereof, with interest thereon at the rate of six (6%) per cent. per annum, payable to the said party of the first part, to secure the payment of which said notes a vendor's lien is hereby retained on the real estate hereby conveyed, do hereby grant sell and convey unto the said party of the second part, its successors and assigns, with covenant of general warranty sub-

Exhibit No. 8.

1165

ject to reservations and exceptions hereinafter contained.

All the coal within and underlying two (2) certain tracts and parcels of land situate in Union District, Barbour County, West Virginia, on the waters of Buckhannon River, and hereinafter more fully set out and described, together with the right to mine and remove all of said coal, upon, in and under the two (2) said tracts of land, including the right to enter upon and under said land to mine and remove all of said coal, and to remove upon and under said land the coal from and under lands co-terminus and contiguous thereto, together with all necessary and convenient rights-of-way through and under said land, with drainage, ventilation and ventilating shafts to remove the coal from neighboring lands, hereby waiving all damages arising therefrom, said tracts and parcels of land being described as follows:

1166

FIRST TRACT: Beginning at a corner of Kerr and Rohr; thence with Kerr's line south $31^{\circ} 20'$ West, fifteen hundred four and four tenths (1504.4) feet to a stone; thence South $33^{\circ} 50'$ West, ten hundred and fifteen and five tenths (1015.5) feet to a stone; South 46° East, five hundred twenty-nine and six tenths (529.6) feet to a stone in road, corner of Charles Reger; thence with road South, $52^{\circ} 30'$ West, two hundred (200) feet in road; South $66^{\circ} 50'$ West, one hundred seventy-two (172) feet in road; thence South, $17^{\circ} 40'$ East, two hundred ninety-one and seven tenths (291.7) feet; thence South, $14^{\circ} 50'$ West, four hundred five (405) feet to

1167

1168

Exhibit No. 8.

- a stone; thence South, 67° 45' East, four hundred one and nine tenths (401.9) feet to an oak on the bank of the Buckhannon River; and thence down the same North, 11° East, two hundred thirty-three and five tenths (233.5) feet; North, 29° 30' East, two hundred forty-five (245) feet; North, 50° 10' East, two hundred sixty-six (266) feet; North, 42° 30' East, two hundred eighty-nine and two tenths (289.2) feet; North, 53° 10' East, nine hundred seventy (970) feet to a white oak, corner of
- 1169 Teter; thence leaving the river North, 21° 30' West, two hundred six and three tenths (206.3) feet to the center of the road by an ash and oak; thence South, 89° 10' East three hundred forty-one and eight tenths (341.8) feet to a stake in the road; thence South, 87° East, One hundred twenty-eight and seven tenths (128.7) feet to a stake in road; thence North, 9° 30' East, six hundred forty-five and two tenths (645.2) feet to a lynn; thence North, 10° West eleven hundred sixteen (1116) feet to a stake on the North side of Big Run; thence North, 77° West, seven hundred
- 1170 fifty-five and four tenths (755.4) feet to the beginning. Containing ninety-three and three hundred ninety-one thousandths (93.391) acres.

But the party of the first part excepts and reserves from this conveyance four and two hundred one thousandths (4.201) acres thereof, which has heretofore been conveyed to the Point Pleasant & Tygarts Valley Railroad Company by deed dated on the 16th day of May, 1900, and of record in the Clerk's Office of the County Court of Barbour County, in Deed Book No. 45, page 59, to deed reference is made for a descrip-

Exhibit No. 8.

1171

tion thereof, leaving a net acreage of eighty-nine and nineteen hundredths (89.19) acres, be the same more or less.

There is expressly reserved and excepted as to said coal within and underlying this tract of land the right to drill through said coal and operate for oil and gas, but no drilling shall be done in the main opening of any mines.

SECOND TRACT: Beginning at a stake on the East side of the county road, a corner to Barrett's land, and running thence South $85\frac{3}{4}^{\circ}$ East, 1172 twenty-eight and nineteen hundredths (28.19) poles to a stake, thence South, $31^{\circ} 35'$ West, crossing the county road, Big Run and the B. & O. Railroad, ninety-two and eighteen hundredths (92.18) poles to a stone, corner to Marshall Reg-
er's land; thence North, $41^{\circ} 42'$ West, forty and seven tenths (40.7) poles to a stone; thence North, $88\frac{3}{4}^{\circ}$ East, twelve (12) poles to a stone; thence North $4\frac{1}{2}^{\circ}$ East, crossing said railroad, run and county road, seventy-two (72) poles to a stone in Barrett's line; thence with this line South, $53^{\circ} 33'$ East, thirty-seven and seventy-five-hundredths 1173 (37.75) poles to the place of beginning. Contain-
ing twenty-one and one tenth (21.1) acres, less one and nine hundred thirty-three thousandths (1.933) acres now owned and occupied by the Baltimore & Ohio Railroad Company, a corpora-
tion.

It is expressly understood and agreed that the right is hereby reserved to the party of the first part and its grantors, to drill through said coal and operate for oil and gas, but drilling

1174

Exhibit No. 8.

shall not be done in the main opening of any mine.

Being the same premises conveyed to the Volga Coal Company by deed of Louis A. Henderson and Wife, et al, dated April 7, 1917, and recorded in Deed Book 88, page 405.

1175

Also a certain tract or parcel of surface land in said Union District in said County, being a part of the said tract of land mentioned and described in the deed hereinbefore recited, and being that part thereof lying around the mine openings, containing (1) acre, more or less, and being more particularly bounded and described as follows, to wit:

1176

Beginning at a stake on line of lands of William R. Reager and line of right-of-way of Baltimore & Ohio Railroad; at the point where same crosses Reager's line; thence along right-of-way East, four hundred (400) feet to land of S. E. House, thence along land of said House in a Southeasterly direction, one hundred twelve (112) feet to a stake; thence along other lands now or formerly of Sarah E. House and others in a Southwesterly direction, two hundred fifty-six (256) feet to a stake; thence along the same in a Westerly direction, two hundred eight-six and one-half ($286\frac{1}{2}$) feet to a corner of land of William R. Reager; thence along land of said Reager in a Northeasterly direction, fifty-four (54) feet to the place of beginning.

Being the same premises conveyed to the said Volga Coal Company by deed of Sarah E. House, et al, dated May 28, 1919, and recorded in Deed Book 91, page 193.

Exhibit No. 8.

1177

IN WITNESS WHEREOF, the said parties of the first part has caused this deed to be signed in its corporate name by its President, its corporate seal to be hereunto affixed and attested by its secretary the day and year first above written.

VOLGA COAL COMPANY,

By _____
President.

Attest:

Secretary.

State of Pennsylvania, }
County of Fayette, } ss.:

1178

I, _____ a Notary Public of said County of Fayette and State of Pennsylvania, do hereby certify that _____ personally appeared before me in my said county, and being by me duly sworn did depose and say that he is the president of the corporation described in the writing hereto attached, bearing date the day of July, 1920, authorized by said corporation to execute and acknowledge deeds or papers of said corporation; and that the seal affixed to said writing is the corporate seal of said corporation; and that the said writing was signed and sealed by him in behalf of said corporation by its authority, duly given; and that the said _____ acknowledged the said deed to be the act and deed of the said corporation.

1179

Witness my hand and official seal this _____ day of July, A. D. 1920.

Notary Public.

My commission expires _____

1180

EXHIBIT NO. 9.

THIS DEED, made this 27th day of November, A. D. 1920, by and between the Diamond Fuel Company, a corporation organized under the laws of the State of Delaware, of the first part, and Charles S. Chestnut, of the City of Philadelphia and State of Pennsylvania, of the second part;

1181 WHEREAS, by a certain contract of sale dated the 15th day of April, 1920, and recorded in the office of the Clerk of the Court of Barbour County, West Virginia, in Deed Book No. 93, page 198, etc. the Lee Collieries Company, granted and conveyed unto the Diamond Fuel Company, all its estate, rights, easements, privileges, estates and interests which it acquired by virtue of a certain contract and deed of lease dated the 25th day of May, 1917, between Wilbert N. Malone, Trustee, and the said Lee Collieries Company; and also all the interest of the Lee Collieries Company under and by virtue of a certain contract or Deed of Lease by and between the Mayday Coal Company and Wilbert N. Malone, Trustee for the Lee Collieries Company (being designated as the Lee 1182 Coal Co.) dated the 15th day of March, 1917, and recorded in the Barbour County Court Clerk's Office in Deed Book No. 90, page 215. All of the rights, benefits, estates, privileges, easements and real estate, acquired by the said Wilbert N. Malone as Trustee having been conveyed by him under the aforesaid deed of 25th of May, 1917, to the said Lee Collieries Company, and the said Lee Collieries Company further agreed to covenant generally, the title to said lease in the estates described in said leases.

Exhibit No. 9.

1183

And, Whereas, the said Lee Collieries Company, in said contract of sale, granted unto the Diamond Fuel Company, with covenants of general warranty, all of the real estate heretofore conveyed to the Lee Collieries Company by Deed of the Mayday Coal Company dated the 15th day of June, 1917, and recorded in the Barbour County Clerk's Office in Deed Book No. 91 at page 202, including the tipple, houses, sidetrack, office-building, blacksmith shop, barn, shanties, and all structures, improvements, mining development, trackage, and all appurtenances, fixtures and improvements upon said real estate, whether hereinbefore specifically set forth or not.

1184

Also all the tools contained in said blacksmith shop so to be conveyed as aforesaid; twenty (20) certain mine cars of a capacity of forty-two (42) bushels each, all to be in good condition; approximately thirty-five (35) tons 25 and 16 pound steel rails, virtually all of which are laid upon said real estate, and one pair of six ton mine scales and two mules and mine harness therewith, and all personal property of every kind and character now situate upon the real estate hereinbefore referred to, whether hereinbefore set forth or not.

1185

Now this Indenture Witnesseth: That for and in consideration of the sum of One Dollar, unto it in hand paid by the said Charles S. Chestnut, and for other valuable considerations from the said Charles S. Chestnut to the said Diamond Fuel Company moving, at and before the enrolling and delivery of these presents, the receipt whereof is hereby acknowledged, the said Dia-

1186

Exhibit No. 9.

mond Fuel Company doth hereby sell, grant and convey unto the said Charles S. Chestnut, party of the second part, his heirs and assigns, with covenants of general warranty, all the estate, right, title and interest, property claim and demand whatsoever of the Diamond Fuel Company of, in and to the real estate, rights, easements, privileges, estates and interests heretofore acquired by the said Diamond Fuel Company under and by virtue of the hereinbefore recited contract between the Lee Collieries Company, dated the 15th day of April, 1920.

1187

And for the consideration aforesaid, the said Diamond Fuel Company doth further sell, grant and convey unto the said Charles S. Chestnut, his heirs and assigns, all and singular, the personal property and improvements subsequently acquired and placed or erected on any of the said properties for mining or other purposes.

To have and to hold the said premises, real, personal and mixed hereinbefore described unto the said Charles S. Chestnut, his heirs and assigns forever.

1188

IN WITNESS WHEREOF, the said Diamond Fuel Company has caused its name to be signed hereto by its President and its corporate seal duly attested, to be hereto affixed the day and year first above written.

DIAMOND FUEL COMPANY,

By HENRY P. BOPE,

(Seal)

Its President.

Attest the corporate seal

of the Diamond Fuel Company.

By GARDENER YERKES,

Its Secretary.

State of New York,
County of New York, to-wit:

I, FRANK E. STRIPE, a Notary Public of the said County of New York, do certify that H. P. Bope personally appeared before me in my said County, and being by me duly sworn, did depose and say that he is President of Diamond Fuel Company, the corporation described in the writing hereto annexed, bearing date the 27th day of November, 1920, authorized by said Diamond Fuel Company to execute and acknowledge deeds and other writings of said Diamond Fuel Company, and that the seal affixed to said writing is the corporate seal of said Diamond Fuel Company, and that said writing was signed and sealed by him in behalf of said Diamond Fuel Company by its authority duly given. And the said H. P. Bope acknowledged the said writing to be the act and deed of said Diamond Fuel Company. 1190

Given under my hand and official seal this 27th day of November, 1920. 1191

FRANK E. STRIPE,
Notary Public of, in and for the
County of New York and State
of New York.

My Commission expires the 30th day of
March, 1922.

1192

Exhibit No. 9.

The State of West Virginia,
Barbour County Court Clerk's Office,
Nov. 30, 1920.

The foregoing Deed and certificate of acknowledgment thereto annexed were this day presented in said office and on motion of Charles C. Chestnut duly admitted to record in Deed Book No. 94, page 117.

1193

Attest:

S. F. HOFFMAN,
Clerk.

1194

EXHIBIT NO. 10.

THIS DEED made the 7th day of January, A. D., 1921, by and between CHARLES S. CHESTNUT, of the City of Philadelphia and State of Pennsylvania, and MAUD M. his wife, parties of the first part, and BARBOUR LEWIS COAL COMPANY, a corporation organized under the laws of the State of West Virginia, of the second part.

WHEREAS by a certain Deed dated the 27th day of November, 1920, and recorded in the County Clerk's Office of Barbour County West Virginia, in Deed Book 94, page 117, the Diamond Fuel Company conveyed into the said Charles S. Chestnut, his heirs and assigns, the property therein set forth. 1196

NOW THIS INDENTURE WITNESSETH that the said parties of the first part, for and in consideration of the sum of One Dollar, lawful money of the United States of America unto them in hand paid at and before the sealing and delivery of these presents and for other valuable considerations unto them moving, the receipt whereof is hereby acknowledged, do give, grant, bargain, sell and convey unto the Barbour Lewis Coal Company, its successors and assigns, with covenants of special warranty, all the estate, right, title, interest, property, claim and demand whatsoever of the parties of the first part, of, in and to, the real estate, rights, easements, privileges, estates and interest hereinbefore acquired by the said parties of the first part under and by virtue of the aforesaid deed 1197

1198

Exhibit No. 10.

dated the 27th day of November, 1920, from the Diamond Fuel Company.

And for the consideration aforesaid, the said parties of the first part do further, sell, grant and convey unto the Barbour Lewis Coal Company, its successors and assigns, all and singular the personal property and improvements subsequently acquired and placed or erected on any of the said properties for mining or other purposes.

1199 To have and to hold the said premises, real, personal and mixed, hereinbefore described, unto the said Barbour Lewis Coal Company, its successors and assigns forever.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first aforesaid.

CHARLES S. CHESTNUT.
MAUD M. CHESTNUT.

1200 Sealed and delivered in
the presence of us

ALPHEW B. RUE.
S. KURTZ HANGLEY.

State of Pennsylvania, }
 County of Philadelphia, } ss.:

I, W. ANNESELEY, a Notary Public for the State of Pennsylvania, residing in the City and County of Philadelphia, do certify the Charles S. Chestnut and Maud M. Chestnut his wife, whose names are signed to the writing above, bearing date the 7th day of January, 1921, have this day acknowledged the same before me in my said County.

1202

Given under by hand this 21st day of January, 1921.

W. ANNESLEY,
 Notary Public,
 Commission expires at end of
 next Session of the Senate.

The State of West Virginia,
 Barbour County Court Clerk's Office,

1203

Feb. 7, 1921.

The foregoing Deed and certificate of acknowledgement thereto annexed were this day presented in said office and on motion of Barbour Lewis Coal Co. admitted to record in Deed Book No. 94, page 261.

Attest:

J. F. HEWITT,
 Clerk.

1204

EXHIBIT NO. 11.

Fisher Summitt Coal Company's account with
the Diamond Fuel Company of New York, N. Y.

	<i>Date</i>	<i>Invoice</i>	<i>Amount</i>
	1920		
	Aug. 31	340	\$3735.15
	Sep't. 10	343	2431.36
1205	10	344	2868.30
	14	348	3566.80
	14	349	2218.95
	14	350	496.73
	15	352	2738.25
	15	353	3494.65
	20	358	2829.11
	20	359	3224.25
	21	360	3311.50
	24	361	1155.33
	24	362	4840.20
	27	365	1466.38
1206	28	368	1888.25
	28	369	3099.21
	29	370	1897.65
	Aug. 31	371	522.62
	Sept. 30	376	2513.06
	30	379	1339.86

*Exhibit No. 11.*1207

<i>Date</i>	<i>Invoice</i>	<i>Amount</i>
1920		
Oct. 14	382	412.09
14	384	4429.34
14	385	6517.05
16	388	393.28
16	389	6772.35
18	390	5704.58
18	391	4806.43
18	392	4312.69
21	395-396	4832.70
21	397-398	3988.14
25	401	2090.52
25	402	3536.25
25	403	1736.35
25	404	6028.88
25	405	3529.13
25	406	1193.95
25	407	5234.78
28	410	2563.46
28	411	4795.45
28	412	1096.88
29	413	2856.70
29	414	5317.65
29	415	3595.75
30	418	1521.45
30	419	4802.40
30	420	2428.88

1208

1209

1210

Exhibit No. 11.

	<i>Date</i> 1920	<i>Invoice</i>	<i>Amount</i>
	Oct. 30	423	2517.95
	30	424	3609.94
	30	425	2691.45
	30	427	2860.23
	30	428	4007.25
	Nov. 9	429	3072.75
	10	430	1064.25
	10	431	1839.13
1211	30	432	4399.20
	11	433	1783.73
	11	434	1607.63
	11	435	2950.80
	11	436	3794.85
	20	437	1360.91
	20	438	3564.90
	20	439	983.46
	20	440	2600.80
	22	441	335.51
	22	443	341.25
	23	444	993.75
1212	Dec. 1	450	757.50
	2	451	1340.50
	7	453	784.13
			<hr/> \$193396.61

Exhibit No. 11.

1213

CREDITS AS FOLLOWS:

<i>Date</i>	<i>Invoice</i>	<i>Amount</i>	
1920			
Dec. 21	433-436	844.72	
1	438-434-439-		
	418-402-404	2851.07	
7	437	596.28	
4	424	536.25	
Nov. 22	414-414-415	1656.37	
27	413	597.30	
Oct. 29	368	1888.25	1214
1921			
Jan. 15	348	2609.43	
Apr. 5	414	588.90	
		<hr/>	
		\$12168.57	\$12168.57
Aug. & Sep't. Coal purchased from			
Diamond Fuel Company		1802.41	
Checks received			
#157, 198, 208 & 229		110108.17	
		<hr/>	
Total Credits		\$124079.15	1215
		<hr/>	
Balance Due		\$ 69317.46	

I hereby certify that the above is a true and accurate statement of our account with the Diamond Fuel Company.

FISHER SUMMIT COAL COMPANY,

JAS. M. STARK,

Secy-Treas.

Dated 12/29/21.

EXHIBIT NO. 12.**(STATEMENT of H. M. CRAWFORD COAL CO.)**

Phillippi, West Virginia, Nov. 16th, 1920

Diamond Fuel Co.
Fairmont, W. Va.

<i>Date</i>	<i>Initial</i>	<i>Number</i>	<i>Kind</i>	<i>Pounds</i>	<i>Tons</i>	<i>Price f.o.b.</i>	<i>Amount</i>	<i>Destina- tion</i>
11-1-20	W&LE	60313		98100				Curtis Bay
"	PMc							" "
"	K&Y	61652		113100				" "
"	B&O	320984		117700				" "
				<u>328900</u>	16445	6.00	986.70	

(Copy)

(STATEMENT OF H. M. CRAWFORD COAL CO.)

Phillippi, West Virginia, Nov. 27th, 1920

Diamond Fuel Co.
Fairmont, W. Va.

<i>Date</i>	<i>Initial</i>	<i>Number</i>	<i>Kind</i>	<i>Pounds</i>	<i>Tons</i>	<i>Price f.o.b.</i>	<i>Amount</i>	<i>Destina- tion</i>
11-1	B&O	126725	R/M	112000	5600	6.00	33600	Curtis Bay Piers

(Copy)

(STATEMENT OF H. M. CRAWFORD COAL CO.)

Phillippi, West Virginia, Nov. 30th, 1920.

Diamond Fuel Co.
Fairmont, W. Va.

<i>Date</i>	<i>Initial</i>	<i>Number</i>	<i>Kind</i>	<i>Pounds</i>	<i>Tons</i>	<i>Price f.o.b.</i>	<i>Amount</i>	<i>Destina- tion</i>
11-1	L.V.	24789	R/M	110100	5505	6.00	330.30	Curtis Bay Piers

(Copy)

EXHIBIT NO. 13.

Diamond Fuel Company,
to
Law & McCue,

1919.		Dr.	Cr.
Aug. 8	To Organizing Diamond Operating Co.,	\$100.00	
" 24-26	To trip N. Y. by request & consultation,	150.00	
" 27	By cash to McCue,		250.00
Sept. 3-5	To trip Charleston Diamond Fuel & Diamond Operating Co. securing charter,	125.00	
" 3	To cash pd. Sec. State fees for Operating Co. by McCue,	60.00	1220
Nov. 14	To cash pd. Clerk for recording deed by McCue and transfers,	7.50	
1920.			
Mar. 17	To trip N. Y. consultation & ex. (Law)	200.00	
" 30	To services preparing resolution directors, mortgage ,etc. for loan Del. Trust Co.	2000.00	
Aug. 24	To trip to Weston examination of title Stone Coal Co. & preparation of deed,	250.00	
Sept. 29	To trip to Weston closing Stone Coal Co. deal—Deed left for record, notes delivered,	100.00	1221
	Balance due,		\$2,742.50

1222

EXHIBITS
(Offered on Trial.)

Exhibit 1—Stipulation withdrawing answer of Diamond Fuel Company.

Exhibit 2—Consent of attorney to withdrawal of answer of Diamond Fuel Company.

Exhibit 4—Receipts given by Gardner Yerkes to Mr. Robinson covering transfer of \$200,000, offered in evidence, p. 67.

Exhibit 5—Letter from Baltimore & Ohio Railroad Co.—, dated December 20, 1920, offered in evidence p. 123.

1223

Exhibit—6—Letter to Stires & Barron signed by J. G. Malone, offered in evidence, p. 129.

Exhibit 7—Telegram addressed to Pittsburgh & West Virginia Coal Co., dated October 29, 1920.

Exhibit 8—Answering telegram on the same day.

Exhibit 9—Telegram dated October 30, from Moore & Co.

1224

Exhibit 10—Answering telegram addressed to Moore & Co., October 30, signed by Pittsburgh & West Virginia Coal Co.

Exhibit 11—Telegram dated October 30, to Pittsburgh & West Virginia Coal Co., signed by Moore & Co.

Omitted from Record, and to be offered at argument of this appeal by petitioning creditors by order of Judge Augustus N. Hand, dated April 7, 1922.

OPINION, A. N. HAND, D. J.

No. 750.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PITTSBURGH & WEST VIRGINIA
COAL Co., *et al.*,
Petitioners,

against

DIAMOND FUEL COMPANY, a cor-
poration, alleged bankrupt,
Respondents.

1226

NASH ROCKWOOD, attorney for Petitioners;

STETSON, JENNINGS & RUSSELL, attorneys for In-
tervening Petitioners, THOMAS F. BARRETT,
NASH ROCKWOOD, R. H. MCNEILL, GEORGE W.
SAGE, THEODORE KEINDL, JR., and FREDERICK
W. GIRDNER, Counsel;

1227

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
attorneys for Intervening Objecting Credi-
tors, CHARLES R. HICKOX and D. M. TIBBETTS,
Counsel;

FRANK E. STRIPE, attorney for Respondent, J. K.
ELLENBOGEN, OTTO GILLIG and MANNING
STIRES, Counsel.

1228

Opinion, A. N. Hand, D. J.

AUGUSTUS N. HAND, District Judge:

1229

1230

This is a contested adjudication in bankruptcy. The alleged bankrupt withdrew its answer, but the answer of certain objecting creditors stands, and it is stipulated that these objecting creditors hold claims that are at least to some extent valid. The petitioning creditors therefore must establish their case. Only one of them, the Pittsburgh & West Virginia Coal Company is said not to be a valid creditor. Its claim is for 18 cars of coal shipped by mistake. If there is any claim arising out of such a transaction it is in quasi contract by reason of unjust enrichment. Mr. Barrett testified to an admission by the vice-president of the Diamond Fuel Company that it had accepted this coal, but admitted that the parties could not agree as to the price. The objecting creditors attached this coal by process of foreign attachment in a suit in admiralty against the Diamond Fuel Company, and sold it with other coal in that proceeding. I think it is too late after taking such a step to offer at the trial to release their attachment against the 18 car loads, or their proceeds. They cannot restore the parties to their original position by returning the coal sold under their process in admiralty and the Diamond Fuel Company has never attempted to do this and by withdrawing its answer has ratified the transaction so far as possible. The 15 car loads ordered by the Pittsburgh & West Virginia Coal Company were embraced in the shipment of the 18 cars sent by mistake, have never been paid for, and were like-

wise apparently sold to satisfy the decree in admiralty of the objecting creditors.

Moreover, intervening creditors with good claims have cured any defect in a petition which was sufficient on its face, and these creditors make the original petition valid from its inception, if there was a defect in the claim of one of the original creditors. The case is not like that of an original petition which was invalid on its face, *In re Stein*, 115 Fed., 749; *In re Triangle S. S. Co.*, 267 Fed., 800, is distinguishable upon this ground.

1232

The transfer to Chestnut was plainly intended to prefer a limited number of creditors. It may be that the coal lands transferred were of little value but Mr. Barrett with ample experience I believe honestly attempted to value the equity in the Arden property at \$65,000. and the preferred creditors evidently believed it had considerable value. If the \$200,000, be treated as the real consideration there was certainly a preference. If on the contrary it was a mere subterfuge and was not used to reduce the claims of the creditors participating in the transaction, the lands transferred were intended as a preferential transfer for the benefit of these creditors. I am not inclined to hold that these lands which the creditors took interest enough in to secure for themselves were of no value, and I am clear that the Diamond Fuel Company was insolvent at the time.

1233

Upon the whole case an adjudication must be granted.

A. N. H.,
D. J.

March 6, 1922.

1234

ORDER OF ADJUDICATION.

IN THE

DISTRICT COURT OF THE UNITED
STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

1235

IN THE MATTER

of

DIAMOND FUEL COMPANY,
Bankrupt.In
Bankruptcy.

1236

At New York City, in said District, on the 6th day of March, A. D. 1922, before the Honorable John C. Knox, Judge of the said Court in Bankruptcy, the petition of Pittsburgh & West Virginia Coal Co., et al. that Diamond Fuel Company be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered and the issues having been tried and order of adjudication ordered the said Diamond Fuel Company is hereby declared and adjudged a bankrupt accordingly.

AND IT IS FURTHER ORDERED that the said bankrupt file schedules in triplicate as required by law within ten days from the date hereof.

Order of Adjudication.

1237

AND IT IS FURTHER ORDERED that the said matter be referred to John J. Townsend one of the referees in bankruptcy of this Court, to take all such further proceedings therein as are required by said Acts of Congress, and all such acts therein as the Court might take or perform, except such as by law or the general orders of the Supreme Court are required to be performed by the Judge; and that the said bankrupt shall attend before said referee on the 10th day of March, 1922, at 10 o'clock, A. M., and thenceforth shall submit to such orders as may be made by said referee or by the Court relating to its said bankruptcy.

1238

WITNESS, the Honorable John C. Knox, Judge of the said Court, and the seal thereof, at The City of New York, in said District, on the 6th day of March, A. D. 1922.

JNO. C. KNOX,
District Judge.

ALEX. GILCHRIST, JR.,
Clerk.

1239

1240

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

1241

DIAMOND FUEL COMPANY,
Alleged Bankrupt.

In Bankruptcy
No. 29,239.

SIRS:

1242

PLEASE TAKE NOTICE that the answering creditors, Canute Steamship Company, Ltd., and Compania Naviera Sota y Aznar, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit at the next term thereof, to be held at the Court Rooms in the United States Court and Post Office Building, Borough of Manhattan, City of New York, from the order, judgment and decree made herein on or about the 6th day of March, 1922, adjudicating the above mentioned Diamond Fuel Company a bankrupt and ordering that the matter be referred to John J. Townsend, Esq., referee, and from each and every part of said order, judg-

Notice of Appeal.

1243

ment and decree as well as from the whole thereof.

Dated, New York, March 15th, 1922.

Yours, etc.,

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Attorneys for Answering Creditors
Canute Steamship Co., et ano.

To:

1244

FRANK STRIPE, Esq.,
Attorney for Alleged Bankrupt,
220 Broadway, New York City.

STIRES & BARRON, Esqs.,
Attorneys for Receiver,
220 West 42d Street, New York City.

ROCKWOOD & LARK, Esqs.,
Attorneys for Petitioning Creditors,
527 Fifth Avenue, New York City.

STETSON, JENNINGS & RUSSELL, Esqs.,
Attorneys for Intervening Creditors
James E. Law, et al.,
15 Broad Street, New York City.

1245

1246

PETITION FOR APPEAL

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

 IN THE MATTER

of

1247

 DIAMOND FUEL COMPANY,
 Alleged Bankrupt.

TO THE HONORABLE JUDGES OF THE UNITED STATES
 DISTRICT COURT FOR THE SOUTHERN DISTRICT
 OF NEW YORK.

1248 The answering creditors Canute Steamship Company, Ltd., and Compania Naviera Sota y Aznar, conceiving themselves aggrieved by the order, judgment and decree entered in the above entitled proceedings on or about the 6th day of March, 1922, adjudicating the above named Diamond Fuel Company a bankrupt and ordering that it be referred to John J. Townsend, Esq., referee, do hereby petition for an appeal from said order, judgment and decree to the United States Circuit Court of Appeals for the Second Circuit and pray that their appeal may be allowed and a citation granted directed to the petitioning creditors, Pittsburgh & West Vir-

Petition for Appeal.

1249

ginia Coal Company, H. M. Crawford Coal Company and Herman J. Poling and Herbert S. Haller, copartners, doing business under the name of Boulder Coal Company; and to intervening creditors James E. Law and Anthony S. McCue, copartners, doing business under the firm name and style of Law & McCue, and Morgantown Coal Company; the receiver herein, John B. Johnson, Esq.; the bankrupt herein, Diamond Fuel Company, commanding them and each of them to appear before the United States Circuit Court of Appeals for the Second Circuit to do and receive as may appertain to the justice to be done in the premises and that a transcript of the record, proceedings and evidence in said proceeding duly authenticated, the petition in bankruptcy filed by said Pittsburgh & West Virginia Coal Company, et al. on or about the 25th day of February, 1921; the answer of the alleged bankrupt to said petition; the intervening petition of James E. Law et al.; the appearance and answer of answering creditors Canute Steamship Company et ano. to the petition of said Pittsburgh & West Virginia Coal Company; the answer of said answering creditors Canute Steamship Company et ano. to the petition of the said James E. Law et al.; the order of this Court permitting the filing of such answer; the testimony, depositions, evidence, exhibits and proceedings upon the trial of the issues raised by said answers had before Honorable Augustus N. Hand; the opinion of said Honorable Augustus N. Hand, deciding said issues in favor of said petitioning creditors and directing that said

1250

1251

1252

Petition for Appeal.

1253

Diamond Fuel Company be adjudicated bankrupt; the order, judgment and decree made herein on or about the 6th day of March, 1922, adjudicating the said Diamond Fuel Company a bankrupt and ordering that the matter be referred to John J. Townsend, Esq., referee; and all other papers relevant to the appeal herein may be presented to the United States Circuit Court of Appeals for the Second Circuit, and that an order may be made fixing the amount of security which the appellants shall give and furnish upon said appeal and that upon the giving of the said security all further proceedings herein except those taken in connection with said appeal be stayed until the determination of the said appeal by the United States Circuit Court of Appeals for the Second Circuit.

CANUTE STEAMSHIP COMPANY,

By

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Attorneys.

1254

By ROBERT S. ERSKINE

COMPANIA NAVIERA SOTA Y AZNAR,

By SOTA & AZNAR, New York,

Acting as Agents.

By VAN KRIEKEN. /

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Attorneys for Answering Creditors
Canute Steamship Co. et ano.

Petition for Appeal.

1255

State of New York, }
County of New York, } ss.:

ROBERT S. ERSKINE, being duly sworn, says:

I am a member of the firm of Kirlin, Woolsey, Campbell, Hickox & Keating, attorneys for the answering creditor Canute Steamship Company herein.

I have read the foregoing petition and know the contents thereof and the same is true to the best of my knowledge, information and belief.

1256

The reason this verification is not made by the answering creditor Canute Steamship Company is that it is a foreign corporation and none of its officers is within this district.

ROBERT S. ERSKINE.

Sworn to before me this
15th day of March, 1922.

WM. O. GODDARD,

Notary Public, Kings County.

Certificate filed in New York County.

1257

1258

Petition for Appeal.

State of New York, }
 County of New York, }^{ss.}:

PIETER C. A. VAN KRIEKEN, being duly sworn,
 says:

I am procurator of Sota and Aznar, New York, acting as agents to Naviera Sota y Aznar, one of the answering creditors herein.

1259 I have read the foregoing petition and know the contents thereof and the same is true to the best of my knowledge, information and belief.

The reason this verification is not made by said creditor Compania Naviera Sota y Aznar is that it is a foreign corporation and none of its officers is within this district.

PIETER C. A. KRIEKEN.

Sworn to before me, this
 15th day of March, 1922.

1260 Wm. O. GODDARD,
 Notary Public, Kings County.
 Certificate filed in New York County.

ORDER ALLOWING APPEAL.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

DIAMOND FUEL COMPANY,
Alleged Bankrupt.

1262

The foregoing appeal is hereby allowed as prayed and it is

ORDERED that the bond for costs on the appeal be and it hereby is fixed at the sum of \$250. and that upon the filing of such bond all further proceedings except those in connection with the appeal be stayed until the determination of said appeal by the United States Circuit Court of Appeals but in the event that the appeal is not brought on for argument prior to July 1, 1922, the stay shall ipso facto expire and be null and void.

1263

Dated, New York, March 16, 1922.

AUGUSTUS N. HAND,
United States District Judge.

1264

CITATION.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

DIAMOND FUEL COMPANY,
Alleged Bankrupt.

In
Bankruptcy
No. 29,239.

1265

United States of America, ss.:

THE PRESIDENT OF THE UNITED STATES OF
AMERICA,

To

1266

Pittsburgh & West Virginia Coal Company,
H. M. Crawford Coal Company, Herman J. Pol-
ing and Herbert S. Haller, copartners doing
business under the name of Boulder Coal Com-
pany; James E. Law and Anthony F. McCue,
copartners doing business under the firm name
and style of Law & McCue; Morgantown Coal
Company; John B. Johnston, receiver; and Dia-
mond Fuel Company, alleged bankrupt.

GREETING:

You and each of you are hereby cited and
admonished to be and appear in the United

States Circuit Court of Appeals for the Second Circuit at the Court Rooms in the Borough of Manhattan, City of New York, in the District and Circuit above named, on the 15th day of April, 1922, pursuant to an appeal duly obtained and filed in the office of the Clerk of the District Court of the United States for the Southern District of New York, wherein you as petitioning creditors, intervening creditors, receiver and alleged bankrupt respectively are the appellees and Canute Steamship Company and Compania Naviera Sota y Aznar, answering creditors, are appellants, to show cause, if any there be, why the order, judgment and decree in the said appeal mentioned should not be reversed and corrected and why speedy justice should not be done to the parties in that behalf and to do and receive what may appertain to the justice to be done in the premises.

1268

WITNESS, The Honorable Learned Hand, one of the District Judges of the United States for the Southern District of New York, this 16th day of March in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and forty-sixth.

1269

AUGUSTUS N. HAND,
United District Judge
for the Southern District of
New York.

1270

ASSIGNMENTS OF ERROR.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

1271

DIAMOND FUEL COMPANY,
Alleged Bankrupt.In Bankruptcy
No. 29,239.

Now on this 15th day of March, A. D. 1922, come the answering creditors, Canute Steamship Company, Ltd., and Compania Naviera Sota y Aznar, and say that the order of adjudication entered in the above cause on the 6th day of March, A. D. 1922, is erroneous and unjust to the answering creditors.

1272

FIRST: Because of error committed by the court in allowing the petitioning creditors to open up the case and produce further evidence in support of the petition after the petitioning creditors had rested, the case had been closed and counsel were in the course of summing up.

SECOND: Because of error committed by the court after opening up the case and hearing further evidence, in adjourning the case for further

Assignments of Error.

1273

hearing upon evidence to be produced by the petitioning creditors.

THIRD: Because of error committed by the court in receiving further testimony in behalf of the petitioning creditors after the case had been closed, upon an adjourned date set for further hearing.

FOURTH: Because of error committed by the court in overruling the objection of answering creditors to the introduction of evidence in support of the bill of particulars filed in support of the petition because the issues set forth in the bill of particulars filed after the close of the case and upon which it was sought to introduce testimony are contrary to the issues set forth in the original petition.

1274

FIFTH: Because the evidence produced by the petitioning creditors in support of the claim of the petitioning creditor, Pittsburgh & West Virginia Coal Company, is at variance with the allegations of the petition in respect thereto and was erroneously admitted by the court.

1275

SIXTH: Because, as shown by the evidence the alleged bankrupt had more than twelve creditors at the time the petition in bankruptcy was filed, and less than three creditors of said alleged bankrupt joined in the petition for an adjudication, and the order of adjudication based thereon is erroneous.

SEVENTH: Because of error committed by the court in holding that the petition in bank-

1276

Assignments of Error.

ruptcy in which less than three creditors had joined as petitioners, might be amended more than four months after the commission of the alleged acts of bankruptcy set forth in the petition by the intervention of other creditors.

EIGHTH: Because the evidence produced upon the trial of the cause did not show the commission of an act of bankruptcy as alleged in the petition and error was committed by the court in making an order of adjudication thereon.

1277

NINTH: Because the petitioning creditors failed to produce evidence sufficient to show that a preference was given to certain creditors of the alleged bankrupt with intent on the part of the alleged bankrupt to prefer such creditors over other creditors of the same class and the court erred in basing an adjudication in bankruptcy thereon.

1278

TENTH: Because the evidence did not disclose that property or money of any value had been transferred by the alleged bankrupt to the creditors as alleged in the petition in bankruptcy.

ELEVENTH: Because the evidence did not show the commission of an act of bankruptcy by the alleged bankrupt.

TWELFTH: Because the order of adjudication in bankruptcy is not supported by and is contrary to the evidence.

*Assignments of Error.*1279

WHEREFORE, defendant prays that the said order of adjudication in bankruptcy of the Diamond Fuel Company be reversed and the District Court directed to dismiss the petition in bankruptcy.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Attorneys for Answering Creditors.

1280

1281

1282

STIPULATION.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

DIAMOND FUEL COMPANY,
Alleged Bankrupt.

1283

CANUTE STEAMSHIP COMPANY,
LTD., and COMPANIA NAVIERA
SOTA Y AZNAR,
Appellants.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

1284 Dated, April 12, 1922.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Attorneys for Appellants.

FRANK STRIPE,
Attorney for Alleged Bankrupt.

STIRES & BARRON,
Attorneys for Receivers.

ROCKWOOD & LARK,
Attorneys for Petitioning Creditors.

STETSON, JENNINGS & RUSSELL,
Attorneys for Intervening Creditors.

CLERK'S CERTIFICATE.

1285

United States of America,
Southern District of New York, } ss.:

IN THE MATTER

of

DIAMOND FUEL COMPANY,
Alleged Bankrupt.

CANUTE STEAMSHIP COMPANY,
LTD., and COMPANIA NAVIERA
SOTA Y AZNAB,

Appellants.

1286

I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

1287

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 12th day of April, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-sixth.

ALEX. GILCHRIST, JR.,
Clerk.

(Seal)

1288

OPINION, C. C. A.**UNITED STATES CIRCUIT COURT OF
APPEALS,****FOR THE SECOND CIRCUIT.**

Before:

HON. HENRY WADE ROGERS,
HON. CHARLES MERRILL HOUGH,
HON. JULIUS M. MAYER,
Circuit Judges.

1289

IN THE MATTER

of

DIAMOND FUEL COMPANY,
Alleged Bankrupt.

CANUTE STEAMSHIP COMPANY,
LTD., and COMPANIA NAVIERA
SOTA Y AZNAR,

Appellants.

1290

Appeal by answering creditors from an order adjudging the Diamond Fuel Company a bankrupt; entered in District Court for the Southern District of New York.

CHARLES R. HICKOX, and D. M. TIBBETS, for answering creditors-appellants;

NASH ROCKWOOD and THEODORE KIENDL, JR., for petitioning creditors and intervenors.

HOUGH, C. J.

This unduly voluminous record presents but one point, necessary for decision.

Three alleged creditors promoted and signed an involuntary petition against Diamond Fuel Company. The act of bankruptcy alleged is a conveyance unlawfully preferring the grantee and the date of such unlawful preference is within four months of petition filed. We agree with the court below that this conveyance and its preferential nature are fully proven and find it unnecessary to discuss this matter further. 1292

The present appellant intervened and answered the petition, denying that one of the signers of the petition for adjudication was a creditor of the alleged bankrupt.

Thereupon and more than four months after commission of the act of bankruptcy, certain other creditors intervened and were permitted to join, in the petition for adjudication. The result was that at trial there were three or more undoubted creditors demanding adjudication.

We will assume (but not decide) that one of the three parties who swore to the original petition as creditors, was not in point of fact a creditor at all. This means that the proof of indebtedness was insufficient but the allegation of indebtedness was in point of form perfect. 1293

The one question raised by this appeal is whether, assuming such lack of proof on the part of one of the three original petitioners, the suit or proceeding was validated by the addition of other petitioners who did prove that they were creditors after the expiration of the four month period.

1294

Opinion, C. C. A.

This court has, we think, clearly indicated the distinction between an amendment or addition to a petition jurisdictionally defective and similar action in respect of one jurisdictionally sufficient.

An amendment inserting a new act of bankruptcy speaks only from the date of amendment (*Re Havens*, 255 Fed., 478, and cases cited) and any petition is jurisdictionally defective unless it pleads an act of bankruptcy in proper form.

1295

But in this case the original petition was not jurisdictionally defective; it might fail for lack of proof of many things, *e. g.* that it was brought by three *bona fide* creditors. But it would have withstood a demurrer and an unopposed adjudication based thereon would have been perfectly valid.

But where the defect will appear only through failure of proof, *e. g.* in respect of evidence of indebtedness, any qualified creditor or creditors may come in, pick up and carry forward the petition which its original proponents are not able or willing to do.

1296

If it were otherwise it would often be an easy matter when four months had elapsed after the act of bankruptcy to induce or persuade one of the petitioning creditors to default upon his claim and thus avoid adjudication.

The exact point was decided in *Re Bolognesi*, 233 Fed., 772. We find nothing in *Re Triangle Co.*, 267 Fed., 300, opposed to this ruling, and in so far as some of the language in *Despres vs. Galbraith*, 213 Fed., 190 is to the contrary. We adhere to the opinion regarding that decision expressed in *Re Bolognesi, supra*.

Order affirmed with costs.

ORDER FOR MANDATE.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 29th day of May one thousand nine hundred and twenty-two.

Present:

HON. HENRY WADE ROGERS,
HON. CHARLES M. HOUGH,
HON. JULIUS M. MAYER,
Circuit Judges.

1298

IN THE MATTER

of

DIAMOND FUEL COMPANY,
Alleged Bankrupt.

CANUTE STEAMSHIP COMPANY,
LTD., and COMPANIA NAVIERA
SOTA Y AZNAR,
Appellants.

1299

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the

1300

Order for Mandate.

United States, for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

1301

H. W. R.

C. M. H.

(Endorsed):

United States Circuit Court of Appeals, Second Circuit—In re Diamond Fuel Co.—Order for Mandate—United States Circuit Court of Appeals, Second Circuit—Filed May 31, 1922—William Parkin, Clerk.

1302

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 434 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Matter of Diamond Fuel Company, Alleged Bankrupt; Canute Steamship Company, Ltd., and Compania Naviera Sota y Aznar, Appellants, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 20th day of June in the year of our Lord One Thousand Nine Hundred and twenty-two and of the Independence of the said United States the One Hundred and forty-sixth.

Wm. Parkin, Clerk. (Seal of United States Circuit Court of Appeals, Second Circuit.)

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit entitled In the matter of Diamond Fuel Company, Alleged Bankrupt, Canute Steamship Company, Ltd., and Compania Naviera Sota y Aznar, appellants, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 29,021. Supreme Court of the United States, October Term, 1922. No. 471. Canute Steamship Company, Ltd., et al. vs. Pittsburgh & West Virginia Coal Company et al. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 11, 1923. William Parkin, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1921

No. 314

In the Matter of DIAMOND FUEL COMPANY, Alleged Bankrupt;
CANUTE STEAMSHIP CO., LTD., and COMPANIA NAVIERA SOTA Y
AZNAR, Appellants.

It is hereby consented that the certified transcript of record in the above entitled proceeding now on file in the Office of the Clerk of the Supreme Court of the United States, be taken as a return to the writ of certiorari herein, dated October 26, 1922.

Dated, January 11th, 1923.

Kirlin, Woolsey, Campbell, Hickox & Keating, Attorneys for Appellants Canute Steamship Company and Compania Naviera Sota y Aznar. Rockwood & Lark, Attorneys for Petitioning Creditors. Stetson, Jennings & Russell, Attorneys for Intervening Petitioning Creditors. Frank E. Stripe, Attorney for Alleged Bankrupt. Stires & Barros, Attorneys for John B. Johnston, Receiver.

To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated New York, January 12th, 1923.

Wm. Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit. (Seal of United States Circuit Court of Appeals, Second Circuit.)

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Diamond Fuel Company. Return to Certiorari. 471-29,021.

[Endorsed:] File No. 29,021. Supreme Court U. S., October Term, 1922. Term No. 471. Canute Steamship Co., Ltd., et al., petitioners, vs. Pittsburgh & West Virginia Coal Co. et al. Writ of certiorari and return. Filed Jan. 17, 1923.

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SUPREME COURT OF THE UNITED STATES.

CANUTE STEAMSHIP COMPANY, LTD., and
COMPANIA NAVIERA SOTA Y AZNAR,

Petitioners,

vs.

PITTSBURG & WEST VIRGINIA COAL COMPANY,
et al.,

Respondents,

October
Term,
1922.
No.

Sirs:

Please take notice that the annexed petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, will be submitted to the Supreme Court of the United States on the opening of Court on the third day of October, 1922, or as soon thereafter as counsel can be heard.

Dated New York,
July 7, 1922.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Attorneys for Petitioners,
27 William Street,
New York City.

To: ROCKWOOD & LARK,
Attorneys for Petitioning Creditors.
STETSON, JENNINGS & RUSSELL,
Attorneys for Intervening Petitioning Creditors.
STIRES & BARRON,
Attorneys for Receiver.
FRANK E. STRIPE, Esq.,
Attorney for Alleged Bankrupt.

SUPREME COURT OF THE UNITED STATES.

CANUTE STEAMSHIP COMPANY, LTD., and
COMPANIA NAVIERA SOTA Y AZNAR,
Answering Creditors,
Petitioners,

vs.

PITTSBURG & WEST VIRGINIA COAL COMPANY,
H. M. CRAWFORD COAL COMPANY, and HER-
MAN J. POLING and HERBERT S. HALLER, co-
partners, doing business under the firm
name and style of BOULDER COAL COM-
PANY,

Petitioning Creditors,

JAMES E. LAW and ANTHONY F. McCUE, co-
partners in the practice of law under the
firm name of LAW & McCUE, and MORGAN-
TOWN COAL COMPANY,

Intervening Petitioning Creditors,

DIAMOND FUEL COMPANY,
Alleged Bankrupt,

JOHN B. JOHNSTON,

Receiver,
Respondents,

October
Term,
1922.
No.

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED
STATES:

Your petitioners, Canute Steamship Company, Ltd,
and Campania Naviera Sota Y Aznar, answering credi-

tors of the alleged bankrupt, respectfully show unto this Court as follows:

FIRST: Your petitioner Canute Steamship Company, Ltd., is and was at all the times hereinafter mentioned a corporation duly organized and existing under the laws of the Kingdom of Great Britain and Ireland, and your petitioner, Compania Naviera Sota Y Aznar, is and was at all the times hereinafter mentioned a corporation duly organized and existing under the laws of the Kingdom of Spain.

Your petitioners are creditors of the alleged bankrupt having provable claims against it in the aggregate amount of approximately \$162,677.47. On October 28th, 1920, they began proceedings in admiralty in the United States District Court for the District of Maryland against the alleged bankrupt to recover damages for breaches of certain charter parties and at the same time attached coal standing to the credit of the alleged bankrupt in the Tidewater Coal Exchange at Baltimore. The coal has been sold and the proceeds, amounting approximately to the sum of \$110,000, are now held by a Trustee pending the determination of appeals taken from final decrees rendered by United States District Court for the District of Maryland in favor of your petitioners in said proceedings. Your petitioners are unsecured creditors of the alleged bankrupt to the extent of approximately \$52,677.47 and accrued interest thereon.

SECOND: On February 25, 1921, a petition in involuntary bankruptcy was filed by Pittsburgh & West Virginia Coal Company, H. M. Crawford Coal Company and

Boulder Coal Company, who alleged that they had provable claims against the alleged bankrupt, in an amount exceeding \$500. The act of bankruptcy alleged in the petition was a preferential transfer on November 27, 1920, of certain coal properties belonging to the alleged bankrupt.

About March 3rd, 1921, the alleged bankrupt filed a verified answer in which it denied insolvency, denied that it had committed an act of bankruptcy as alleged in the petition and alleged that the transfer of property complained of was for a good and valuable consideration. It also denied that Pittsburgh & West Virginia Coal Company had a provable claim against the Diamond Fuel Company, and alleged that it did not owe Pittsburgh & West Virginia Coal Company any amount whatsoever.

A receiver was thereafter appointed, but no further proceedings were had until about September 19, 1921, when, pursuant to an order of the District Court, two additional creditors, Law & McCue, a co-partnership, and Morgantown Coal Company were permitted to intervene, by intervening petitions which in substance adopted the allegations of the original petition and did not allege any additional act of bankruptcy.

Petitioners herein entered their appearance and answered the intervening petition and on October 10, 1921, on leave granted by the Court, filed their answer to the original petition. These answers denied the insolvency of the alleged bankrupt, denied the commission of an act of bankruptcy as alleged in the petition and denied that Pittsburgh & West Virginia Coal Company, one of the original petitioners, was a creditor. Record, Folios 67-96.

THIRD: The evidence produced at the trial established that Pittsburgh & West Virginia Coal Company was not a creditor of the alleged bankrupt. Taken in its most favorable light, the evidence only showed that certain cars of coal were consigned by it to Diamond Fuel Company at Tidewater Coal Exchange, Curtis Bay, Maryland, by mistake and without any order; that if it arrived at that point it immediately became subject to an attachment proceeding which had been commenced previously to the arrival of the coal, and that it was not accepted or used by Diamond Fuel Company.

FOURTH: The District Court entered an order of adjudication. The trial Judge did not make an express finding as to whether Pittsburgh & West Virginia Coal Company was a creditor of Diamond Fuel Company or not, but grounded his opinion on the proposition that the intervention of other creditors more than four months after the alleged act of bankruptcy was committed validated the proceeding from its inception.

FIFTH: The Circuit Court of Appeals affirmed the order of adjudication of the District Court. That Court in its opinion assumed without deciding that Pittsburgh & West Virginia Coal Company was not a creditor and took the position that an involuntary petition which is defective in the number of petitioning creditors may be cured by the intervention of a sufficient number of other creditors even though such intervention occurs more than four months after the commission of the act of bankruptcy alleged in the petition, and that as so amended an adjudication was justified, although based on an alleged

act of bankruptcy committed almost ten months before the amendment.

REASONS FOR ALLOWANCE OF WRIT.

1. The original petition in bankruptcy, having been filed by only two qualified creditors, was jurisdictionally defective inasmuch as it is requisite under Section 59b of the Bankruptcy Act that where there are twelve or more creditors of the alleged bankrupt, three or more creditors having provable claims must join in a petition for an adjudication in involuntary bankruptcy. The petition being jurisdictionally defective could not be cured from its inception by the subsequent intervention of other creditors more than four months after the commission of the alleged act of bankruptcy. The trial court and the Circuit Court of Appeals for the Second Circuit, therefore, erred in holding that an adjudication was warranted, based upon an alleged act of bankruptcy committed almost ten months previously to the intervention of qualified creditors in sufficient number to amend the jurisdictional defect in the petition. The petition as amended by such intervention could stand, if at all, only as an original petition and to warrant an adjudication in bankruptcy should have alleged an act of bankruptcy committed within four months previously to the filing of the intervening petition.

2. The questions involved in this case, or questions analogous thereto, have been before the Circuit Courts of Appeal for the Second, Fifth and Eighth Circuits

and the decisions of those courts are not harmonious, as is indicated by the following cases:

Despres v. Galbraith, (C. C. A. 8th Cir., 1914),
213 Fed. 190;

In re Bolognesi, (C. C. A. 2nd Cir., 1915), 223
Fed. 771;

Trammel v. Yarbrough, (C. C. A. 5th Cir., 1918),
254 Fed. 685.

The Circuit Court of Appeals for the 8th Circuit in the case of *Despres v. Galbraith*, *supra*, decided that the original petition was jurisdictionally defective where the number of petitioners was not sufficient and that subsequent interventions by other creditors must stand as original petitions if at all. The Circuit Court of Appeals for the Second Circuit in the instant case and in the case of *In re Bolognesi*, *supra*, has reached a conclusion inconsistent with that of the Eighth Circuit in the case of *Despres v. Galbraith*. In *Trammel v. Yarbrough*, *supra*, the Circuit Court of Appeals for the Fifth Circuit has announced principles which are inconsistent with the conclusion reached by the Circuit Court of Appeals for the Second Circuit in the instant case, the opinion of which is annexed as an appendix to the brief herein, and shows on its face that a diversity of opinion exists.

3. It is of great importance that the questions of construction of the bankruptcy act which are presented in this case should be adjudicated by this Honorable Court. These questions arise in a large number of bankruptcy proceedings and their determination is of vital importance to creditors of bankrupt estates and others who hold as security property of such estates.

WHEREFORE your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to the Supreme Court for its review and determination, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in the said Circuit Court of Appeals in the said case entitled "In the Matter of Diamond Fuel Company, Alleged Bankrupt, Canute Steamship Company, Ltd., and Compania Naviera Sota Y Aznar, Appellants," pursuant to Sections 25d of the Bankruptcy Act of 1898 as amended and 240 of the Judicial Code, and that the said decree of the Circuit Court of Appeals in the said case may be reversed by this Honorable Court, and that your petitioners may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet and in conformity with the said acts, and your petitioners will ever pray, etc.

CHARLES R. HICKOX,
 DELBERT M. TIBBETTS,
 Counsel for Petitioners.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
 Attorneys for Petitioners,
 27 William Street,
 New York City.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

DELBERT M. TIBBETTS,
Counsel.

STATE OF NEW YORK }
County of New York } ss.:

DELBERT M. TIBBETTS being duly sworn, says: that he is one of the attorneys for the petitioner herein and that the foregoing petition is true to the best of his knowledge, information and belief.

DELBERT M. TIBBETTS.

Sworn to before me this }
7th day of July, 1922. }

EARL APPLEMAN,

Notary Public.

SUPREME COURT OF THE UNITED STATES.

CANUTE STEAMSHIP COMPANY, Ltd., and COM-
PANIA NAVIERA SOTA Y AZNAR,

Petitioners,

vs.

PITTSBURG & WEST VIRGINIA COAL COMPANY,
et al.,

Respondents.

October
Term,
1922.
No.

BRIEF IN SUPPORT OF PETITION.

STATEMENT.

This is an application for a writ of certiorari under and pursuant to Section 25d of the Bankruptcy Act of 1898, as amended, and Section 240 of the Judicial Code for a review of the decision and decree of the United States Circuit Court of Appeals for the Second Circuit, affirming an order of adjudication in bankruptcy entered in the United States District Court for the Southern District of New York.

The material facts and the questions involved are set forth in the foregoing petition.

The provision of the Bankruptcy Act involved is Section 59 of the Bankruptcy Act of July 1st, 1898, Chapter 541, as amended, which is as follows:

“WHO MAY FILE AND DISMISS PETITIONS—*a.* Any qualified person may file a petition to be adjudged a voluntary bankrupt.

b. Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over, or if all of the creditors of such persons are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

c. Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

d. If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

e. In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition, or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

f. Creditors other than original petitioners may at any time enter their appearance and join in the

petition, or file an answer and be heard in opposition to the prayer of the petition.

g. A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard."

The only question necessary for consideration on this petition is as follows:

May a petition in bankruptcy in an involuntary proceeding (in a case where there are more than twelve creditors of the alleged bankrupt) filed by only two creditors having provable claims be amended as of the date it is filed by the intervention of other qualified creditors more than four months after the commission of the alleged act of bankruptcy?

FIRST POINT.

THE ORIGINAL PETITION IS JURISDICTIONALLY DEFECTIVE AND IT CANNOT BE VALIDATED *ab initio* BY THE INTERVENTION OF OTHER CREDITORS MORE THAN FOUR MONTHS AFTER THE COMMISSION OF THE ALLEGED ACT OF BANKRUPTCY.

It may be conceded for the purpose of this petition that two of the parties who joined in the original petition

in bankruptcy were qualified creditors for such purpose. The answer of the alleged bankrupt and also of the answering creditors, petitioners herein, specifically denied that the other petitioning creditor, Pittsburgh & West Virginia Coal Company, was a creditor. Neither the trial court nor the Circuit Court of Appeals made an express finding as to whether or not Pittsburgh & West Virginia Coal Company was a creditor. Voluminous evidence on that point was presented at the trial, but it failed to satisfy the trial court or the Circuit Court of Appeals that Pittsburgh & West Virginia Coal Company was a qualified creditor and both courts based their decisions on the proposition that a petition filed by only two qualified creditors might be amended by the intervention of other qualified creditors more than four months after the commission of the alleged act of bankruptcy so as to relate back to the time the petition was filed and take advantage of an act of bankruptcy committed within four months before the original petition was filed, but almost ten months before the filing of the intervening petition.

On this feature of the case the opinion of the Circuit Court of Appeals was—(Italics ours);

“We will assume (but not decide) that one of the three parties who swore to the original petition of creditors was not in point of fact a creditor at all. This means that the proof of indebtedness was insufficient but the allegations of indebtedness were in point of form perfect.”

It is evident, therefore, that the petitioning creditors did not establish to the satisfaction of either the trial

court or the Circuit Court of Appeals that Pittsburgh & West Virginia Coal Company was a creditor.

This is emphasized by remarks of the Trial Judge in the course of the trial, in which he said, fol. 893,

“I am inclined to think that Pittsburgh & West Virginia Coal Company has not a good claim.”

And at fol. 894 the Trial Judge, referring to the proceeds of the coal sold under attachment, said:

“What Pittsburgh & West Virginia Coal Company should do is to get their interests in the proceeds of that coal determined * * *.”

1. *The Opinion of the Circuit Court of Appeals.*

The opinion of the Circuit Court of Appeals does not adhere to the point which it laid down for determination. After saying that it would be assumed that one of the creditors who swore to the original petition of creditors was *not in fact a creditor at all*, the court said:

“The one question raised by this appeal is whether, assuming such lack of proof on the part of one of the three original petitioners, the suit or proceeding was validated by the addition of other creditors who did prove that they were creditors, after the expiration of the four month period.”

The case presented is not merely one of failure of a petitioning creditor to submit proof of its claim, but, on the contrary, Pittsburgh & West Virginia Coal Company presented its proof and that proof established that it was not a creditor. The subsequent remarks of the court in

its opinion, therefore, are not in point on the question for determination. It said:

“But where the defect will appear only through failure of proof, *e. g.* in respect of evidence of indebtedness, any qualified creditor or creditors may come in, pick up and carry forward the petition which its original proponents are not able or willing to do.”

The necessary inference to be drawn from the language above quoted is that if the defect of parties had appeared on the face of the petition it would have been jurisdictionally defective. It must follow that when the jurisdictional allegation with respect to parties was put in issue, plenary proof to establish the jurisdictional point so raised was necessary or the petition would fail for lack of jurisdiction.

Furthermore the court seems to have fallen into error in its reasoning that the defect in the number of petitioning creditors is not jurisdictional. With respect to that point the following language is used:

“But in this case the original petition was not jurisdictionally defective; it might fail for lack of proof of many things, *e. g.*, that it was brought by three *bona fide* creditors. But it would have withstood a demurrer and an unopposed adjudication based thereon would have been perfectly valid.”

That is begging the question. If the provision of the Bankruptcy Act that three creditors shall join in an involuntary petition is jurisdictional, and if one of the parties who have joined is not in fact a creditor, the jurisdictional defect is not removed by failure of the

alleged bankrupt or an answering creditor to raise the question before adjudication. An adjudication in such circumstances would not be perfectly valid, but would be open to attack on jurisdictional grounds in any direct proceeding. The court appears to have lost sight of the distinction between such jurisdictional defects as will expose a judgment to collateral attack, and those of which advantage can be taken only by direct attack.

The situation is quite analogous to that of a suit brought in a Federal Court under such circumstances that the jurisdiction of the court depends entirely on diversity of citizenship, but where the necessary diversity does not exist in fact. The complaint would certainly not be demurrable if the allegations with respect to citizenship were proper, nor, in the absence of fraud or collusion, would a judgment obtained in such action, after a hearing and determination of the issues, be open to collateral attack. *Des Moines Navigation, etc. Co. v. Iowa Homestead Co.*, 123 U. S. 552; *Noble v. Union River Logging Co.*, 147 U. S. 167; *Lacassagne v. Chapuis*, 144 U. S. 119; *New Orleans v. Fisher*, 180 U. S. 185. Nevertheless it cannot be doubted that the court would have to dismiss the suit for lack of jurisdiction, if the defect appeared in the course of the proceedings.

The petitioning creditors submit that the requirement of the Bankruptcy Act that there shall be three petitioning creditors is a jurisdictional one with all its attributes. If the question is raised by answer before adjudication or by any direct proceeding even after adjudication and it is established that less than three creditors have joined, the petition must fail for want of jurisdiction. That being true, the intervention of other creditors thereafter

can validate the proceeding only from the time the petition becomes a sufficient one by such intervention.

As pointed out *infra*, p. 21, the provision of Section 59f of the Bankruptcy Act providing that "creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition" does not in terms or by necessary inference provide that such appearance and joinder in the petition may validate it from its inception.

There is no better reason to consider that a defect of parties in the petition is not a jurisdictional requirement than a failure to embody in the petition a proper allegation of an act of bankruptcy, yet the court in its opinion concedes that the latter defect is a jurisdictional one. On that point it said:

"An amendment in asserting a new act of bankruptcy speaks only from the date of the amendment (*Re Havens*, 255 Fed. 478, and cases cited) and any petition is jurisdictionally defective unless it pleads an act of bankruptcy in proper form."

The analogy seems to be unavoidable that if a petition is jurisdictionally defective by reason of the failure properly to allege an act of bankruptcy, it is also jurisdictionally defective if less than the required number of qualified creditors join in the petition.

With respect to the allegation of the act of bankruptcy, the opinion, based on ample authority, holds that a proper allegation of such an act speaks only as of the date a petition is filed containing such an allegation.

This must be equally true with respect to the amendment of a petition by the addition of a sufficient number of qualified creditors. It becomes a sufficient petition, and jurisdiction attaches in the proceeding only when the required number of qualified creditors have actually joined in the petition.

2. Strict compliance with the Statute should be required.

The jurisdiction of the Bankruptcy Court is entirely dependent upon the Statute, and to the extent that the provisions of the Statute are designed to take away vested rights, they should be strictly construed.

The petitioners by virtue of their attachment proceedings at Baltimore obtained vested rights of property which in the ordinary course of law they would be entitled to enjoy, but if an adjudication in bankruptcy is upheld in accordance with the opinion of the Circuit Court of Appeals it will be asserted by the trustee in bankruptcy that their attachments must fall by reason of the fact that they were obtained within four months of the filing of the petition in bankruptcy.

This is not a case in which one creditor has secured an advantage over other creditors by virtue of the consent or aid of the alleged bankrupt. But such advantages as have been obtained have resulted to the petitioners by reason of their diligence in the assertion of their ordinary legal remedies. They should not be deprived of those rights through the medium of a drastic law which deprives persons of rights and property to which they are ordinarily entitled, unless the specific requirements of the Statute are strictly complied with.

The bankruptcy law in this respect abrogates the ordinary rights of parties and, as in the case of foreign attachment, garnishment and distress proceedings, parties should comply strictly with the requirements of the Statutes, if they are to invoke successfully the jurisdiction of the court. This feature of the law was pointed out by Hazel, J., in *In Re C. Moench & Sons* (W. D. N. Y. 1903) 123 Fed. 977, where, after discussing the rights of an attaching creditor to answer an involuntary petition, he said at page 978:

“Those rights are sought to be wrested from it pursuant to a Statute in derogation of the general common law rights, and cannot be wiped away without a hearing.”

3. *The requirement of the Statute with respect to the number of petitioning creditors is jurisdictional.*

This construction of Section 59b is well recognized. In *Cutler v. Nu-Gold Ring Co.*, 264 Fed. 836, C. C. A. 8th-1920, Sanborn, J., at page 838 (Italics ours):

“ . . . the law is now settled beyond dispute that *the existence of three provable claims* held by three petitioners, respectively, of the alleged bankrupt, and, if challenged by pleading, *plenary proof thereof is jurisdictional* and indispensable to the maintenance of an involuntary petition in bankruptcy.”

The subsequent intervention almost ten months after the alleged act of bankruptcy of a sufficient number of qualified creditors cannot validate *ab initio* an involuntary petition which is jurisdictionally defective because of a deficiency of qualified petitioners.

The only possible theory on which the original petitioners and the intervening petitioners in this case can proceed, is that the original petition is somehow rendered valid from the beginning by "amendment." Unless they are able to derive authorization for this by necessary implication from the express provisions of the statute, their theory must fail.

Apart from the statute, certainly, to state their proposition is to refute it. Jurisdictional requisites being absent, the original petition is a dead thing. It has not either actual or potential life. Amendment involves change in an *existing* thing. This was well pointed out in the case of *In Re Mercur*, C. C. A. 3rd-1903, 122 Fed. 384. There the members of a partnership had been individually adjudicated bankrupts. Certain petitioning creditors, who were also firm creditors, sought to *amend* their petition, so as to obtain an adjudication against the firm as of the date of the bankruptcy of the individual partners. Their application was denied. At page 388 the Court says:

"The general right to amend, regardless of the time which has elapsed, is abundantly sustained by the authorities. . . . But to do so, it is plain there must be in the record as it stands the substance of that which is asked for; the right to amend can go no further than to bring forward and make effective that which is in some shape, already there."

Respondents will doubtless urge that *Section 59f* of the Bankruptcy Act authorizes intervening creditors to render a void original petition valid *ab initio*. The section reads as follows:

“Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.”

It is submitted that such a broad proposition cannot be supported except by an unwarranted construction of this section. Joinder is permitted by this section only where there is an existing petition. If there is not any proceeding before the Court, as is the case where the petition is jurisdictionally defective, the intervention must stand, if at all, as a new proceeding. Section 59f merely confers on creditors a *privilege* to become parties, so that they may be represented at the trial of the issues and have a hand in *carrying on a going* litigation. It does not contain anything which contravenes the principle that parties plaintiff in a cause cannot by their own action comply retroactively with jurisdictional requirements. These remarks have added force in view of the sweeping effect of the statute in setting aside common-law rights, as pointed out above. The proceeding in this case was a nullity until the intervening petition was filed. Then, for the first time, three qualified petitioning creditors were before the court. At that time, and not before, the court obtained jurisdiction of the cause.

These principles are thoroughly supported by authority.

A forceful decision by the Circuit Court of Appeals for the Eighth Circuit in *Despres v. Galbraith*, 1914, 213 Fed. 190, is directly in point. That was a case where an involuntary petition was filed by three creditors who had

previously assented to a general assignment whereby they expressly released the alleged bankrupt from liability. More than four months later, an intervening petition was filed by three qualified creditors. The District Court ordered an adjudication as of the date of filing the original petition. The Circuit Court of Appeals held that the adjudication could only be based on the intervening petition and that certain alleged preferences, given within four months of the filing of the original petition but more than four months before the intervening petition, could not be disturbed. At page 193, the Court said:

“The bankruptcy act authorizes the filing of a petition in bankruptcy by creditors of the bankrupt. If the creditors are less than twelve in number, one creditor may file the petition; if more than twelve, then three or more creditors must join; but in both cases they must be creditors at the time the petition is filed. . . . We are of the opinion that the petition of February 1, 1912, was void for the want of proper petitioners. That being true, the intervening petitions could draw no support from it. The rule is clearly stated by the court in *Robinson v. Hanway*, Fed. Cas. No. 11,953, as follows:

‘But we are of the opinion that the original creditors’ petition is void for want of proper petitioners, and did not give the court jurisdiction of the case, and that the intervening petitions are also void for want of an original petition to give them force. It is not a case of amendment of a defective petition of which the court has jurisdiction, and when the interveners perfect the petition by additional numbers and amounts. But it is an attempt to give life to a dead petition, to ingraft branches upon a lifeless stock, and infuse vitality into it.

The interveners must draw their support, if at all, from the original petition; but in this case the original petition is dead, and neither supports the interveners or itself.'

"The intervening petition therefore must be considered as an original petition filed as of date June 3, 1912, and the adjudication treated as an adjudication based upon that petition alone and cannot relate back to the petition filed February 1st."

Trammel v. Yarbrough, 1918, 254 Fed. 685, decided by the Circuit Court of Appeals for the Fifth Circuit, presented a situation closely analogous to the case at bar. There, an involuntary petition was dismissed for want of prosecution, but in the order of dismissal the right was reserved to any other creditors to intervene and have the matter reopened within thirty days. A sufficient number of qualified creditors intervened within the thirty days but more than four months after the act of bankruptcy alleged. The district court rendered an adjudication of bankruptcy. This was reversed. Walker, Circuit Judge, said at page 687:

"A reopening of the proceedings to let in other creditors to carry it on, after the elimination from it of all who had previously been actors in it, was in necessary effect the institution of a new proceeding."

In *In re Condon*, C. C. A., 1913, 209 Fed. 800, Judge Lacombe, after disposing of the original petition as being jurisdictionally defective because of the insufficiency of the allegations of the act of bankruptcy, said (*Italics ours*):

“Thereafter, on May 25, 1911, the petition was amended by setting forth the details of twelve separate transactions of the kind charged in the original petition. *Since the petition became a sufficient one only when it was fortified with this amendment, the date of the amendment must be taken as the date from which the four months period of Section 3b is to be calculated. This eliminates all of said alleged transactions except the last four.*”

Judge Hough covered the same point by his observations in *In Re Havens*, C. C. A., 1918, 255 Fed. 478, 481:

“It was assumed below that this was an act of bankruptcy not set forth in the original petition and only charged in and by an amendment made more than four months after its commission. Whether such an act, occurring more than four months before amendment, could be introduced into a pending proceeding, was thought an ‘interesting question’ by Lacombe, J., in the Riggs case supra.

“This court answered it in the negative, *In re Haff*, 136 Fed. 80, 68 C. C. A. 646, the matter not having been covered by *In re Sears*, 117 Fed. 294, 54 C. C. A. 532, which was correctly explained and limited in application by *Gleason v. Smith*, 145 Fed. 897, 75 C. C. A. 427. The general rule as stated in the *Haff Case* has been approved, especially in the Ninth Circuit (*Walker v. Woodside*, 164 Fed. 685, 90 C. C. A. 644), and in the Seventh (*In re Brown Commercial Car Co.*, 227 Fed. 390, 142 C. C. A. 83.) Our own decision (*In re Condon*, 209 Fed. 801, 126 C. C. A. 524) is (in this respect) but a re-assertion of the *Haff Case*.

"This rule rests in theory upon the reasoning of Justice Nelson In re Craft, 6 Blatchf. 177, Fed. Case No. 3,317, where it was pointed out that 'to allow a substantial amendment—that is, one going to the whole foundation of the proceeding *nunc pro tunc*—would be a direct violation of a limitation 'obviously for the benefit of the debtor,' namely, the requirement that proceedings must be brought within a limited time after the act of bankruptcy is committed; i. e., under the present statute, four months."

In the *Triangle Steamship Co.* case, 1920, 267 Fed. 303, a petition had been held defective for insufficiency of allegations of acts of bankruptcy. An amended petition was filed by the same petitioners. On demurrer this amended petition was dismissed. Judge Mayer said, p. 303:

"The transactions then set forth are the only ones specifically stated to have occurred more than four months prior to the filing of the amended petition but apparently within four months prior to the filing of the original petition. The question then is whether for the purpose of calculating the four months the date is that of the original or that of the amended petition.

"It is settled by authority."

Judge Mayer then quotes from the *Condon* and *Havens* cases and cites *In re Louisell Lumber Co.*, C. C. A. 5th Cir. 1913, 209 Fed. 784.

In *In re Louisell Lumber Company*, C. C. A. 5th Circ., 1913, 209 Fed. 784, the original petition was defective in failing to allege any act of bankruptcy as required by

the statute. After more than seven months had gone by the creditors were permitted to amend their petition by setting up an act of bankruptcy consisting of an admission by the bankrupt of inability to pay debts. An adjudication was then entered and the trustees sought to set aside a levy that had been made within four months of the filing of the original petition but more than four months before the filing of the amended petition. The Court of Appeals held that the amendments did not relate back to the time of filing of the original petition and that the attachment could not be set aside.

“It would defeat the intention of the bankruptcy act if creditors could file a blank or skeleton petition against their debtor, alleging no act of bankruptcy, and, after a lapse of more than four months, amend it by filling up the blanks, alleging acts of bankruptcy, and have the amendment relate back in its effect for a period of over eight months to a time within four months before the filing of the blank petition, and dissolve valid liens then existing on the bankrupt's property. And it would clearly conflict with the act to permit such defective petition to be made effective by the debtor's acknowledgment of insolvency and willingness to be adjudicated a bankrupt, made by him over four months after such defective petition is filed, and cause such confession, when alleged by amendment, to relate back in its effect more than eight months so as to dissolve valid liens on the bankrupt's property then existing. If a petition alleging no act of bankruptcy may lie dormant for more than four months, and then by amendment be given retroactive vitality, cancelling liens made secure by the four months' limitation, the same effect would be given the amendment of such a petition.

made twelve months after it was filed, thereby annulling liens that had attached sixteen months before the amendment. We cannot approve a procedure that leads to such results. It would be destructive of rights intended to be preserved by the four months' limitation."

It would be even more objectionable to permit persons who are not creditors to file a petition, allow it to remain dormant for more than six months, and then on the intervention of qualified creditors, to hold that the petition so amended took effect as of the time the original defective petition was filed, with the consequences suggested in the language just quoted.

The Circuit Court of Appeals considered the case of *In re Bolognesi*, 223 Fed. 771, decided by it in 1915, a controlling authority. A close examination of the facts and of the rationale of the decision will show, however, that it is not at all inconsistent with the principles we have pointed out above. From the facts stated by the court, it appears that, although the original petitioners were estopped by reason of their participation in a general assignment, *other* and *qualified creditors* sufficient in number to give jurisdiction, intervened in the petition *within four months of the act of bankruptcy*. It was while the proceeding was in this condition, that the intervention occurred by Valori and other qualified creditors, more than four months after the act of bankruptcy. The proceeding was a valid one, therefore, when Valori intervened. Their position probably could not be affected by the withdrawal of all the previous petitioners, although Judge Hough, then in the District Court, considered that the petition should be dismissed on the ground

that all the qualified creditors who had intervened within the four months' period had withdrawn, and that jurisdiction attached only as of the time of the intervention of the creditors who remained in the case.

The reasoning of Judge Lacombe in that case also plainly shows that he considered that intervention in a *void* petition, more than four months after the act of bankruptcy alleged, could not save it. He took the position that the original petitioners were in law "*creditors*" who were capable of initiating proceedings. This is apparent from his language at page 773:

"Certainly the original proceeding cannot be held a *void* one because facts may be shown in affirmative defense which may constitute an estoppel against the original petitioners taking advantage of the act of bankruptcy."

The language above quoted may properly be considered dictum, and it is not necessarily inconsistent with the principle we have laid down and for which support is furnished by the authorities previously cited. It may be that a creditor who has a valid claim against the alleged bankrupt has sufficient standing in an involuntary proceeding to be counted as one of the petitioning creditors for the purpose of jurisdiction, although he is estopped from relying on the alleged act of bankruptcy for an adjudication. Jurisdiction having attached, creditors not so estopped subsequently coming in at any time could rely upon the act of bankruptcy so alleged. If the language quoted is not to be so distinguished, however, the doctrine stated is fundamentally wrong in principle, because manifestly if a petition, requiring three qualified creditors, is jurisdictionally defective when it is apparent upon the face of the petition that only two

such creditors are petitioners, it is equally true that the petition is jurisdictionally defective if in fact only two qualified creditors have joined, even though this is not apparent on the face of the petition.

In the present case the petition by means of false allegations made it appear that the Pittsburgh & West Virginia Coal Company, and two other creditors were qualified petitioning creditors. Upon the trial of the case it developed that Pittsburgh & West Virginia Coal Company was not a creditor at all. Only two creditors, therefore, were parties to the petition and the court consequently did not acquire jurisdiction to proceed under that petition. More than six months later two additional creditors intervened, but without alleging an act of bankruptcy occurring within four months prior to the time of the intervention. Then, for the first time jurisdiction might have existed so far as parties were concerned, but it was then wanting because no available act of bankruptcy was alleged.

Both principle and authority, therefore, lead to the result that the original petition in this case was jurisdictionally defective, and such a petition cannot be rendered valid *ab initio* by amendment.

SECOND POINT.

INASMUCH AS THE DECISIONS OF THE CIRCUIT COURTS OF APPEALS WHICH HAVE PASSED ON THE QUESTION HERE INVOLVED ARE NOT UNIFORM, THE WRIT OF CERTIORARI SHOULD BE GRANTED.

As we have shown in the petition and under the first point, the Circuit Court of Appeal for the Second, Fifth

and Eighth Circuits have reached conflicting conclusions which cannot be harmonized.

In these circumstances precedents for granting the writ are found in the following cases:

Cameron v. United States, 1914, 231 U. S. 710.

In that case it was said, pp. 716, 717:

“The controversy is over the meaning of the phrase, ‘a bankrupt whose estate is in process of administration under this act.’ The construction of this provision differs in the Federal Courts, some of them having held that there can be no such examination until after adjudication, as it is only then that the bankrupt can be subjected to such proceeding.”

Graves v. Ashburn (1909), 215 U. S. 331.

In *Illinois Central Trust Co. v. Chicago Auditorium Association* (1916), 240 U. S. 581, the court referring to whether the bankruptcy of one of the parties to a contract constituted an anticipatory breach of the contract said, p. 589:

“Whether the intervention of bankruptcy constitutes such a breach and gives rise to a claim provable in bankruptcy proceedings is a question not covered by any previous decisions of this court, and upon which the other Federal Courts are in conflict.”

The question presented is one of such importance in the administration of the Bankruptcy Act that this Court

should, we submit, set at rest the existing conflict now existing among the lower Federal Courts.

July 7, 1922.

Respectfully submitted,

CHARLES R. HICKOX,
DELBERT M. TIBBETTS,
Counsel.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Attorneys for Petitioners.

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APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Before:

HON. HENRY WADE ROGERS

HON. CHARLES MERRILL HOUGH

HON. JULIUS M. MAYER

Circuit Judges.

IN THE MATTER

of

DIAMOND FUEL COMPANY, alleged
bankrupt,CANUTE STEAMSHIP COMPANY, LTD.,
and COMPANIA NAVIERA SOTA Y
AZNAR,*Appellants.*

*Appeal by answering creditors from an order adjudging
the Diamond Fuel Company a bankrupt; entered in
the District Court for the Southern District of New
York.*

CHARLES R. HICKOX and D. M. TIBBETTS for answering
creditors-appellant;

NASH ROCKWOOD and THEODORE KIENDL, JR. for petition-
ing creditors and intervenors.

HOUGH, C. J.

This unduly voluminous record presents but one point necessary for decision.

Three alleged creditors promoted and signed an involuntary petition against Diamond Fuel Company. The act of bankruptcy alleged is a conveyance unlawfully preferring the grantee and the date of such unlawful preference is within four months of petition filed. We agree with the Court below that this conveyance and its preferential nature are fully proven and find it unnecessary to discuss this matter further.

The present appellant intervened and answered the petition, denying that one of the signors of the petition for adjudication was a creditor of the alleged bankrupt.

Thereupon and more than four months after commission of the act of bankruptcy, certain other creditors intervened and were permitted to join in the petition for adjudication. The result was that at trial there were three or more undoubted creditors demanding adjudication.

We will assume (but not decide) that one of the three parties who swore to the original petition as creditors was not in point of fact a creditor at all. This means that the proof of indebtedness was insufficient but the allegation of indebtedness was in point of form perfect.

The one question raised by this appeal is whether, assuming such lack of proof on the part of one of the three original petitioners, the suit or proceeding was validated by the addition of other petitioners who did prove that they were creditors after the expiration of the four month period.

This Court has, we think, clearly indicated the distinction between an amendment or addition to a petition jurisdictionally defective and similar action in respect of one jurisdictionally sufficient.

An amendment inserting a new act of bankruptcy speaks only from the date of amendment (*Re Havens*, 255 Fed., 478, and cases cited) and any petition is jurisdictionally defective unless it pleads an act of bankruptcy in proper form.

But in this case the original petition was not jurisdictionally defective; it might fail for lack of proof of many things, *e.g.* that it was brought by three *bona fide* creditors. But it would have withstood a demurrer and an unopposed adjudication based thereon would have been perfectly valid.

But where the defect will appear only through failure of proof, *e.g.* in respect of evidence of indebtedness, any qualified creditor or creditors may come in, pick up and carry forward the petition which its original proponents are not able or willing to do.

If it were outhewise it would often be an easy matter when four months had elapsed after the act of bankruptcy to induce or persuade one of the petitioning creditors to default upon his claim and thus avoid adjudication.

The exact point was decided in *Re Bolognesi*, 223 Fed., 772. We find nothing in *Re Triangle Co.*, 267 Fed., 300, opposed to this ruling, and in so far as some of the language in *Despres vs. Galbraith*, 213 Fed., 190 is to the contrary, we adhere to the opinion regarding that decision expressed in *Re Bolognesi*, *supra*.

Order affirmed with costs.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1922.

No. 471.

CANUTE STEAMSHIP COMPANY, LTD., AND COMPANIA
NAVIERA SOTA Y AZNAR, *Petitioners,*

against

PITTSBURGH & WEST VIRGINIA COAL COMPANY, ET AL.,
Respondents.

RESPONDENTS' ANSWER AND BRIEF IN OP-
POSITION TO THE PETITION FOR WRIT OF
CERTIORARI TO THE CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.

THE APPLICATION SHOULD BE DENIED FOR THE FOLLOW-
ING REASONS.

1. Prior to October 27, A. D. 1920, the alleged bank-
rupt was engaged in the business of mining and ship-
ping coal from coal mines owned by it, located in West
Virginia; and in purchasing coal from other operators

for export. Its principal office was located at No. 25 West Forty-third Street, in the City of New York.

2. On the 27th day of October, A. D. 1920, the Canute Steamship Company, Ltd., and Compania Naviera Sota y Aznar (the petitioners) instituted in the United States District Court for the District of Maryland, against the alleged bankrupt, a suit in admiralty based upon an alleged breach of Charter Party, and in that proceeding secured an attachment against a large amount of coal held, by the Tidewater Coal Exchange at Baltimore, to the credit of the alleged bankrupt. This coal was sold by agreement of all the parties to the admiralty proceeding and the money realized therefrom, amounting to \$110,000.00 in cash, is impounded by the United States District Court for the District of Maryland, pending the determination of the said admiralty proceeding.

3. On November 27, A. D. 1920, the alleged bankrupt deeded to one Charles S. Chestnut, of Philadelphia, all of its coal lands, mining properties, and personal property located in West Virginia. (Record, pp. 344, 358, and 374.) The said Charles S. Chestnut thereafter, on January 27, A. D. 1921, deeded the same properties to the Barbour-Lewis Coal Company, a corporation formed under the laws of West Virginia. (Record, p. 366.) On the 25th day of February, A. D. 1921, within four months from the date of the said writ of attachment, and also within four months from the date of the execution and recording of the said deeds, the Pittsburgh & West Virginia Coal Company, H. M. Crawford Coal Company, and Boulder Coal Company, creditors of the alleged bankrupt, filed in the United States District Court for the Southern District of New York, an involuntary petition in bankruptcy

against it, and alleged in the petition that the transfers above referred to were made for the purpose of preferring certain creditors who are named in the petition, leaving the petitioning creditors and other creditors of the same class unpaid. Thus preferring the claims of those who obtained the benefit of the preferential deeds, over the petitioning creditors and other creditors of the same class.

A few days after the filing of said involuntary petition, John B. Johnson, Esq., a member of the New York Bar, was, by the United States District Court for the Southern District of New York, appointed receiver of the alleged bankrupt in this cause. Subsequently Judge Pritchard (then Presiding Judge of the Fourth Judicial Circuit) appointed W. H. Cochrane ancillary receiver for the property of the alleged bankrupt located within the jurisdiction of the United States District Court for the Northern District of West Virginia.

On the 3d day of March, A. D. 1921, the alleged bankrupt filed an answer to the petition, denying the act of bankruptcy and its insolvency. On the 19th day of September, A. D. 1921, the Morgantown Coal Company, a Corporation, and Law & McCue, a firm of practising lawyers of Clarksburg, West Virginia, by leave of the Court, filed intervening petitions as creditors of the alleged bankrupt and joined in the original petition.

On the 30th day of September, A. D. 1921, the opposing creditors, to wit, Canute Steamship Company and Compania Naviera Sota y Aznar, by leave of the Court, filed an answer alleging they are creditors of the alleged bankrupt and denying the allegations in the original and intervening petitions.

4. The case was tried in the United States District Court for the Southern District of New York and concluded on the 1st day of February, A. D. 1922, Judge Augustus N. Hand presiding. When the case was called and before other proceedings were had, a member of the New York Bar appeared in Court and presented a certified copy of resolutions passed by the Board of Directors of the alleged bankrupt, assented to in writing by all of its stockholders, authorizing its attorney to withdraw its answer and all opposition to its adjudication as a bankrupt. The case then proceeded upon the issues alone raised by the answer of the two attaching opposing creditors (the petitioners here). As a result of the trial an order of adjudication in bankruptcy was entered by Judge Hand. (App. p. 409.) From this order an appeal was taken by the opposing creditors (the petitioners here) to the United States Circuit Court of Appeals for the Second Circuit, which Court by its decision sustained the order of adjudication. (Opinion by Judge Hough, App. p. 33.)

From the judgment of the Circuit Court of Appeals the opposing creditors (the petitioners here) have applied to this Honorable Court for a writ of certiorari to the said Circuit Court, and allege in support of their application that the opinion of the Circuit Court of Appeals for the Eighth Circuit in the case of *Despres v. Galbraith*, 213 Fed. 190, is in conflict with the opinion of the Circuit Court of Appeals for the Second Circuit in this case, and also with the decision of the Circuit Court of Appeals (second circuit) in *Re Bolognesi*, 223 Fed. 771; and also that there is conflict of opinion upon the same point of law in the decision of the Cir-

cuit Court of Appeals for the Fifth Circuit in the case of Trammell v. Yarborough, 254 Fed. 685.

An examination of Despres v. Galbraith in the Eighth Circuit and Trammell v. Yarborough in the Fifth Circuit, discloses the fact that these cases rest upon an entirely different fundamental state of facts and are not even analogous to the case at bar. Respondents therefore deny there is a material diversity of opinion among the courts of the Second, Fifth and Eighth Circuits upon the form of law decided by the District Court and Circuit Court of Appeals in this case and the other three cases referred to.

The only point of law decided in this case arises out of a construction by the District Court and the Circuit Court of Appeals in harmony with the other courts referred to of Section 59f of the National Bankrupt Act, viz.:

"Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition."

The District Court in deciding the case in part said:

"Moreover, intervening creditors with good claims have cured any defect in a petition which was sufficient on its face, and these creditors make the original petition valid from its inception, *if there was a defect in the claim of one of the original creditors.*" (Italics ours.)

"The case is not like that of an original petition which was invalid on its face, in *Re Stein*, 105 Fed. 749; and in *Re Triangle Steamship Company*, 267 Fed. 300, is distinguishable upon this ground."

The District Court, however, decided that all three of the creditors who signed the original petition were valid petitioners. Respecting one of the claims the Court said:

"Only one of them, the Pittsburgh & West Virginia Coal Company, is said not to be a valid creditor. Its claim is for eighteen cars of coal shipped by mistake. * * * The objecting creditors attached this coal by process of foreign attachment in a suit in admiralty against the Diamond Fuel Company and sold it with other coal in that proceeding. I think it is too late, after taking such a step, to offer at the trial to release their attachment against the eighteen carloads, or their proceeds. They can not restore the parties to their original position by returning the coal sold under process in admiralty, and the Diamond Fuel Company has never attempted to do this, and by withdrawing its answer has ratified the transaction so far as possible."

The Circuit Court of Appeals in its opinion by Judge Hough says:

"This unduly voluminous record presents but one point necessary for decision."

The point being the one above referred to decided by Judge Hand, viz., that two other creditors having undisputed claims had intervened, as they were entitled to do, under Section 59f of the Bankrupt Act.

Neither the District Court nor the Circuit Court considered it necessary to go beyond this one point. It was admitted at the trial, and is admitted in the petition of the opposing creditors to this Court, that at

least four creditors having valid and undisputed claims had joined in the petition prior to the trial.

There was no demurrer interposed, and both the District Court and the Circuit Court found no objection to either the form or the substance of the original petition. On the contrary, the latter Court said in its opinion:

"But in this case the original petition was not jurisdictionally defective; it might fail for lack of proof of many things, *e. g.*, that it was brought by three *bona fide* creditors. But it would have withstood a demurrer, and an unopposed adjudication based thereon would have been perfectly valid."

The three judges who heard and decided the case in the Circuit Court, and the trial judge, are unanimous in their decision upon the point of law involved. And the same point so decided in this case has likewise been decided by the same Circuit Court (2nd Cir.) in *Re Bolognesi*, 223 Fed. 771, where the rule was stated:

"A petition in involuntary bankruptcy, valid on its face, gives the court jurisdiction, and other creditors may, under the Bankruptcy Act July 1, 1898, c. 541, § 59f, 30 Stat. 561 (Comp. St. 1913, § 9643), intervene, though by lapse of time they are barred from originating a proceeding, for their adoption of the original petition relates back to the date it was filed."

The same point was decided in *Re Stein*, 105 Fed. 749-51, Circuit Court of Appeals, Second Circuit. The Court, commenting upon the joinder of additional petitioning parties, said:

"And, even if imaginable cases of hardship may arise, the plain language of the act, authorizing creditors 'at any time' to join in the original petition, can not be disregarded."

The United States District Court for the District of Delaware decided the same question in *Re Mackey*, 110 Fed. 355, as follows:

"As insufficiency in the number of the petitioning creditors is not an incurable jurisdictional defect, by parity of reasoning insufficiency in the amount of provable claims of such creditors can not be held such a defect; for the bankruptcy act equally requires sufficiency in number and sufficiency in amount in order that the petition may be sustained. Clause 'f' was evidently intended to correct defects of either kind at any time during the pendency of the proceedings, whether before or after the expiration of four months from the alleged act of bankruptcy. This construction of the clause is in harmony with its language, is calculated to protect the interests of creditors, and involves no hardship to the defendant."

The United States District Court for the District of Arkansas, in *Re Mammoth Pine Lumber Company*, 109 Fed. 308, decided the same point in the following language:

"There is no pretense in the case at bar that the Ft. Smith creditors were sham creditors. When they filed this petition, they were acting in good faith, an antagonistic to the Mammoth Pine Lumber Company. So that on the face of the proceedings there can be no doubt, if the cases cited above are sound, the proceedings should stand, and the creditors who made themselves parties to

the proceedings, after the expiration of the four months, should be taken into consideration in determining whether or not the necessary number of creditors and amount of indebtedness existed upon which the Mammouth Pine Lumber Company could be adjudicated a bankrupt."

In the Eighth Circuit the same question has likewise been settled in *Corwith Bank v. Haswell*, 174 Fed. 209 (C. C. A. 8th Cir.). There the Court held that an amendment to an involuntary petition in bankruptcy whereby other creditors intervene and join therein, relates back to the filing of the original petition and does not advance the date of the filing.

On page 210 the Court said:

"The contention is that, as the original petition was defective for want of parties, the adjudication on that petition as amended, and the order relating the amendment back to the date of the original petition, was erroneous. The importance of this contention for the bank rests in this: If the 'filing of the petition' within the meaning of section 60 of the bankruptcy act, concerning unlawful preferences, has relation to the filing of the original petition only, the preference which the bank received would be defeated, because less than four months had then elapsed since it was given. If, on the contrary, it has relation to the filing of the amendment, as in this case, the preference would be protected, because more than four months had then elapsed. This contention is clearly untenable. Section 60a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445) as amended by Act Feb. 5, 1903, c. 487, 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314), provides that:

'A person shall be deemed to have given a preference if being insolvent he has within four months before the filing of the petition * * * made a transfer of any of his property,' etc. * * *

"The Amendment as made in this case did not constitute 'the petition' within the meaning of Section 60. It did not by its terms purport to be a petition. It alleged no new act of bankruptcy. It consisted merely in striking out such allegations of the original petition and substituting such other allegations as were requisite to show the joinder of the necessary parties, authorized by section 59d, and their status as creditors. The original petition then remained as if all the averments of the amendment had been bodily incorporated in it.

"Congress, by the provisions of section 59, which seems to have been enacted to meet just such condition of things as is disclosed by this record, very manifestly intended, not that the original petition should be supplanted by the amendment there provided for, but that it might be supplemented by the joinder of other necessary creditors. This is made clear, not only by the provisions of subdivision 'd' but by the provisions of subdivisions 'e' and 'f' of the same section. They all contemplate the retention of the original petition as the pleading upon which subsequent proceedings should be had."

This opinion expressed by the Circuit Court of Appeals for the Eighth Circuit is in harmony with its opinion upon the same point of law in *Despres v. Galbraith*, 213 Fed. 190, *being the case cited by the petitioners here to show the diversity of opinion between the courts of the Second Circuit and the Eighth Cir-*

cuit; but no such diversity of opinion exists, as is clearly shown by the language of the Court:

“It has been repeatedly decided by this Court that where a petition was defective merely, as for example, where a petition was filed by one creditor only who alleged that the debtor had less than twelve creditors known to him, and it was subsequently discovered that there were more than twelve creditors, and therefore the petition must be filed by more than one creditor, the requisite number of creditors might join with the original petitioner prior to adjudication, and that in such case the ‘filing of the petition’ within the meaning of the Bankruptcy Act would relate back to the date of the filing of the original petition by the one creditor. (First State Bank v. Haswell, 174 Fed. 209, 98 C. C. A. 217, and cases there cited.)”

“The three creditors filing the first petition were absolutely disqualified from filing an involuntary petition in bankruptcy by reason of becoming voluntary parties to the assignment contract, as much so as if they had been strangers to the entire proceeding; and it would not be contended, we take it, by anyone that strangers—that is, parties having no claims against a bankrupt—could file a petition against him that would have any validity whatever. The reason given in the cases for denying to one who has become a voluntary party to an assignment contract the right to file an involuntary petition in bankruptcy, basing it upon the assignment as an act of bankruptcy, is that to permit him to do so would be to permit him to take advantage of his own wrong and enable the unscrupulous to entrap a person into involuntary bankruptcy; and it is for this reason that a person who has placed himself in that position is uniformly held to be estopped to

set up an assignment for the benefit of creditors as a ground for adjudging the assignor a bankrupt. This rule does not in any degree tend to affect or defeat the object of the Bankruptcy Law, for as was said by Judge Taft in *Simonson v. Sinheimer*, 95 Fed. 948, 37 C. C. A. 337:

'The estoppel we are considering, if recognized and enforced, does not affect or detract from the paramount character of bankruptcy proceedings, when properly begun, but only prevents the institution of such proceedings by persons who were privy to the act of which they complain and on which they found their prayer for an adjudication.'

Likewise the rule is clearly stated by the Court in *Robinson v. Hanway*, Fed. Cas. No. 11,953, as follows:

'But we are of the opinion that the original creditors' petition is void for want of proper petitioners, and did not give the Court jurisdiction of the case, and that the intervening petitions are also void for want of an original petition to give them force. It is not a case of amendment of a defective petition of which the Court has jurisdiction, and when the interveners perfect the petition by additional numbers and amounts. But it is an attempt to give life to a dead petition, to engraft branches upon a lifeless stock, and infuse vitality into it. The interveners must draw their support, if at all, from the original petition; but in this case the original petition is dead, and neither supports the interveners nor itself.'

In the case of *Trammell v. Yarborough*, 254 Fed. 685, the Court, in harmony with the other cases referred, said:

In this case an answer was filed by the alleged bankrupt, putting in issue the averments of insolvency and acts of bankruptcy, and averred a state of facts relied on as estopping the petitioners to maintain a proceeding. Subsequently other alleged creditors of Trammell filed an intervening petition, which was not acted on by the Court, and it was not served on, or answered, or pleaded to by Trammell. Still later on, another alleged creditor filed an intervening petition which the alleged bankrupt demurred to and answered. The District Court then made an order to the effect that:

‘The Intervention as filed by other creditors seeking adjudication, and the petitioning creditors and intervening creditors having failed to appear and prosecute their action, the case was heard upon the answer and demurrers of the alleged bankrupt, and it appearing that the petitioners and interveners have failed to prosecute their action and that the demurrers as filed by the alleged bankrupt are sufficient, it is therefore ordered that the above styled and numbered cause be dismissed at the cost of petitioning creditors and interveners, reserving, however, to any other creditors of the alleged bankrupt the right to intervene and have this matter reopened within thirty days, and in the event no other creditor of said alleged bankrupt so intervenes for said purposes, then this order for dismissal shall be final. It is further ordered that a copy of this order be published three consecutive days in a leading Dallas newspaper.’

“Within the thirty days’ time one Jack Yarbrough and others filed a petition setting up the above-stated prior occurrences in the bankruptcy proceeding, and that petitioners were creditors

in amounts stated, adopted the allegations of the original previously filed intervening petitions in regard to the acts of bankruptcy and the insolvency of Trammell, and prayed that the above mentioned order dismissing the proceeding be set aside, and that the proceeding be reopened and the petitioners be permitted to intervene and that a hearing be had on the original and intervening petitions. To this latter petition Trammell demurred, and answered the petition, and prayed that the same be referred to a jury. The Court reopened the bankruptcy proceeding and permitted the petitioners in the last filed petition to intervene and join in the original petition, but referred the cause to a special Master in Chancery for a hearing upon issues of fact therein. This resulted in an adjudication of bankruptcy being made on the Master's report, and from that Trammell appealed.

The Court held:

“A revival of the proceeding at the instance of other creditors was not a joinder by them with those who previously had prosecuted the proceeding, because the latter had ceased to be actors in it. So far as they were concerned, the proceeding was not revived. They remained out of it. A reopening of the proceeding let to other creditors to carry it on after the elimination from it of all who previously had been actors, was in necessary effect the institution of a new proceeding.”

The Court further held in that case that the language in paragraph 59f, Bankruptcy Act of July 1, 1898, presupposes the continued presence in the proceeding of petitioners with whom other creditors may join. It does not contemplate a revival of the proceeding after its life has been

ended by the elimination of all who were actors in it; and the Court cites in *Re Bolognesi*, 223 Fed. 771, Circuit Court of Appeals, Second Circuit, in support of the doctrine that intervening creditors may join in a live petition where the joinder is with all or a part of the original creditors.

The opinion of the Court in that case continues in part as follows:

"While Bankruptcy Act, § 59f (Comp. St. § 9643), provides that creditors other than the original petitioner may at any time enter their appearance and join in the petition, yet, where a petition in involuntary bankruptcy is entirely dismissed, it is improper for the Court to reserve to other creditors the right to intervene and have the matter reopened, and where creditors attempted to intervene pursuant to such leave, such proceeding can not be deemed a continuation of the original one."

In all of the foregoing cases the construction of Section 59f of the Bankrupt Act is in harmony with the opinion of the District and Circuit Court in the instant case, while the opinion in the case of *Despres v. Galbraith* is in harmony with Judge Hough's opinion in the case at bar upon the particular point of law involved, but in the *Despres* case the three original petitioners were parties to a general assignment made by the alleged bankrupt prior to the filing of the involuntary petition. The same three creditors having induced the alleged bankrupt to make the assignment and in consideration thereof having expressly released him from their debts, afterwards filed the involuntary petition against him. The Court held as a matter of fact that no one of the three were valid peti-

tioners, or had any claim at all against the alleged bankrupt, therefore the proceeding itself from the beginning had no validity; but at the same time while determining this fact decided the point of law involved in this case as it has been decided by the Circuit Court of Appeals, Second Circuit, in the case at bar.

A careful examination of the cases where this section of the Bankrupt Act has been construed indicates entire uniformity in expression, and opinion, upon this point of law. Counsel for respondents have made a careful examination of the decisions of both the District and Circuit Courts, and have found nowhere any opinion which conflicts with those quoted. We feel justified in saying that Section 59f, according to the strictest canon of construction, can have no other meaning except that creditors other than the petitioning creditors having valid claims against an alleged bankrupt, may at any time intervene and join in the original petition in any proper case. And this theory of the law is not only supported by the decisions of the courts, but as well by the text writers; and it seems likewise to be the almost universal opinion of the legal profession.

The National Bankrupt Act being remedial, its provisions are liberally construed with a view to carrying into effect its obvious purposes and intent, to the end that a debtor who has been unfortunate and become unable to pay his debts may be released therefrom and commence his business life anew, and his property applied equitably and ratably to the payment of his debts. Moreover, it has been the settled practice of the courts to construe the act in the most liberal manner compatible with principles of law and equity, to the end that its purpose may be fulfilled in

a prompt and efficient administration of the estate which come within the jurisdiction of the bankruptcy courts by pleadings regularly filed, and where other provisions of the act are complied with.

We feel constrained to say in conclusion, inasmuch as no diversity of opinion exists which amounts to a conflict of the decisions of the Circuit Courts of Appeals for the Circuits as claimed by the petitioners, and further, inasmuch as four judges who have passed upon the question in sound and well-reasoned opinions concur in the correctness of the decision below, and which opinions without exception are supported by authority, we respectfully urge, the petition of the applicants for a writ of certiorari should not be granted.

TRACY L. JEFFORDS,
ROBERT R. BENNETT,
Solicitors for Respondents.

THOS. F. BARRETT,
Attorney for Respondents.

APPENDIX.

OPINION A. W. HAND, D. J.

No. 750.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

PITTSBURGH & WEST VIRGINIA COAL Co., <i>et al.</i> , <i>Petitioners</i> , against DIAMOND FUEL COMPANY, A CORPORATION, ALLEGED BANKRUPT, <i>Respondents</i> .	}
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NASH ROCKWOOD, Attorney for Petitioners;

STETSON, JENNINGS & RUSSELL, Attorneys for Intervening Petitioners; THOMAS F. BARRETT, NASH ROCKWOOD, R. H. MCNEILL, GEORGE W. SAGE, THEODORE KEINDL, Jr., and FREDERICK W. GIRDNER, Counsel;

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING, Attorneys for Intervening Objecting Creditors; CHARLES R. HICKOX and D. M. TIBBETTS, Counsel;

FRANK E. STRIPE, Attorney for Respondent; J. K. ELLENBOGEN, OTTO GILLIG and MANNING STIRES, Counsel.

Opinion, A. N. Hand, D. J.

AUGUSTUS N. HAND, DISTRICT JUDGE:

This is a contested adjudication in bankruptcy. The alleged bankrupt withdrew its answer, but the answer of certain objecting creditors stands, and it is stipulated that these objecting creditors hold claims that are at least to some extent valid. The petitioning creditors therefore must establish their case. Only one of them, the Pittsburgh & West Virginia Coal Company, is said not to be a valid creditor. Its claim is for 18 cars of coal shipped by mistake. If there is any claim arising out of such a transaction it is in quasi contract by reason of unjust enrichment. Mr. Barrett testified to an admission by the vice-president of the Diamond Fuel Company that it had accepted this coal, but admitted that the parties could not agree as to the price. The objecting creditors attached this coal by process of foreign attachment in a suit in admiralty against the Diamond Fuel Company, and sold it with other coal in that proceeding. I think it is too late after taking such a step to offer at the trial to release their attachment against the 18 car loads, or their proceeds. They cannot restore the parties to their original position by returning the coal sold under their process in admiralty and the Diamond Fuel Company has never attempted to do this and by withdrawing its answer has ratified the transaction so far as possible. The 15 car loads ordered by the Pittsburgh & West Virginia Coal Company were embraced in the

shipment of the 18 cars sent by mistake, have never been paid for, and were likewise apparently sold to satisfy the decree in admiralty of the objecting creditors.

Moreover, intervening creditors with good claims have cured any defect in a petition which was sufficient on its face, and these creditors make the original petition valid from its inception, if there was a defect in the claim of one of the original creditors. The case is not like that of an original petition which was invalid on its face, *In re Stein*, 105 Fed., 749; and *In re Triangle S. S. Co.*, 267 Fed., 300, is distinguishable upon this ground.

The transfer to Chestnut was plainly intended to prefer a limited number of creditors. It may be that the coal lands transferred were of little value, but Mr. Barrett, with ample experience, I believe honestly attempted to value the equity in the Arden property at \$65,000, and the preferred creditors evidently believed it had considerable value. If the \$200,000 be treated as the real consideration there was certainly a preference. If on the contrary it was a mere subterfuge and was not used to reduce the claims of the creditors participating in the transaction, the lands transferred were intended as a preferential transfer for the benefit of these creditors. I am not inclined to hold that these lands which the creditors took interest enough in to secure for themselves were of no value, and I am clear that the Diamond Fuel Company was insolvent at the time.

Upon the whole case an adjudication must be granted.

A. N. H.,
D. J.

March 6, 1922.

APPENDIX.

UNITED STATES CIRCUIT COURT OF
APPEALS,

FOR THE SECOND CIRCUIT.

Before:

HON. HENRY WADE ROGERS

HON. CHARLES MERRILL HOUGH

HON. JULIUS M. MAYER

Circuit Judges.

IN THE MATTER

of

DIAMOND FUEL COMPANY, ALLEGED
BANKRUPT,

CANUTE STEAMSHIP COMPANY, LTD.,

AND COMPANIA NAVIERA SOTA Y

AZNAR,

Appellants.

Appeal by answering creditors from an order adjudging the Diamond Fuel Company a bankrupt; entered in the District Court for the Southern District of New York.

CHARLES R. HICKOX and D. M. TIBBETTS for answering creditors-appellant;

NASH ROCKWOOD and THEODORE KIENDL, JR., for petitioning creditors and intervenors.

HOUGH, C. J.

This unduly voluminous record presents but one point necessary for decision.

Three alleged creditors promoted and signed an involuntary petition against Diamond Fuel Company. The act of bankruptcy alleged is a conveyance unlawfully preferring the grantee and the date of such unlawful preference is within four months of petition filed. We agree with the Court below that this conveyance and its preferential nature are fully proven and find it unnecessary to discuss this matter further.

The present appellant intervened and answered the petition, denying that one of the signors of the petition for adjudication was a creditor of the alleged bankrupt.

Thereupon and more than four months after commission of the act of bankruptcy, certain other creditors intervened and were permitted to join in the petition for adjudication. The result was that at trial there were three or more undoubted creditors demanding adjudication.

We will assume (but not decide) that one of the three parties who swore to the original petition as creditors was not in point of fact a creditor at all. This means that the proof of indebtedness was insufficient but the allegation of indebtedness was in point of form perfect.

The one question raised by this appeal is whether, assuming such lack of proof on the part of one of the three original petitioners, the suit or proceeding was validated by the addition of other petitioners who did prove that they were creditors after the expiration of the four month period.

This Court has, we think, clearly indicated the distinction between an amendment or addition to a petition jurisdictionally defective and similar action in respect of one jurisdictionally sufficient.

An amendment inserting a new act of bankruptcy speaks only from the date of amendment (*Re Havens*, 255 Fed., 478, and cases cited), and any petition is jurisdictionally defective unless it pleads an act of bankruptcy in proper form.

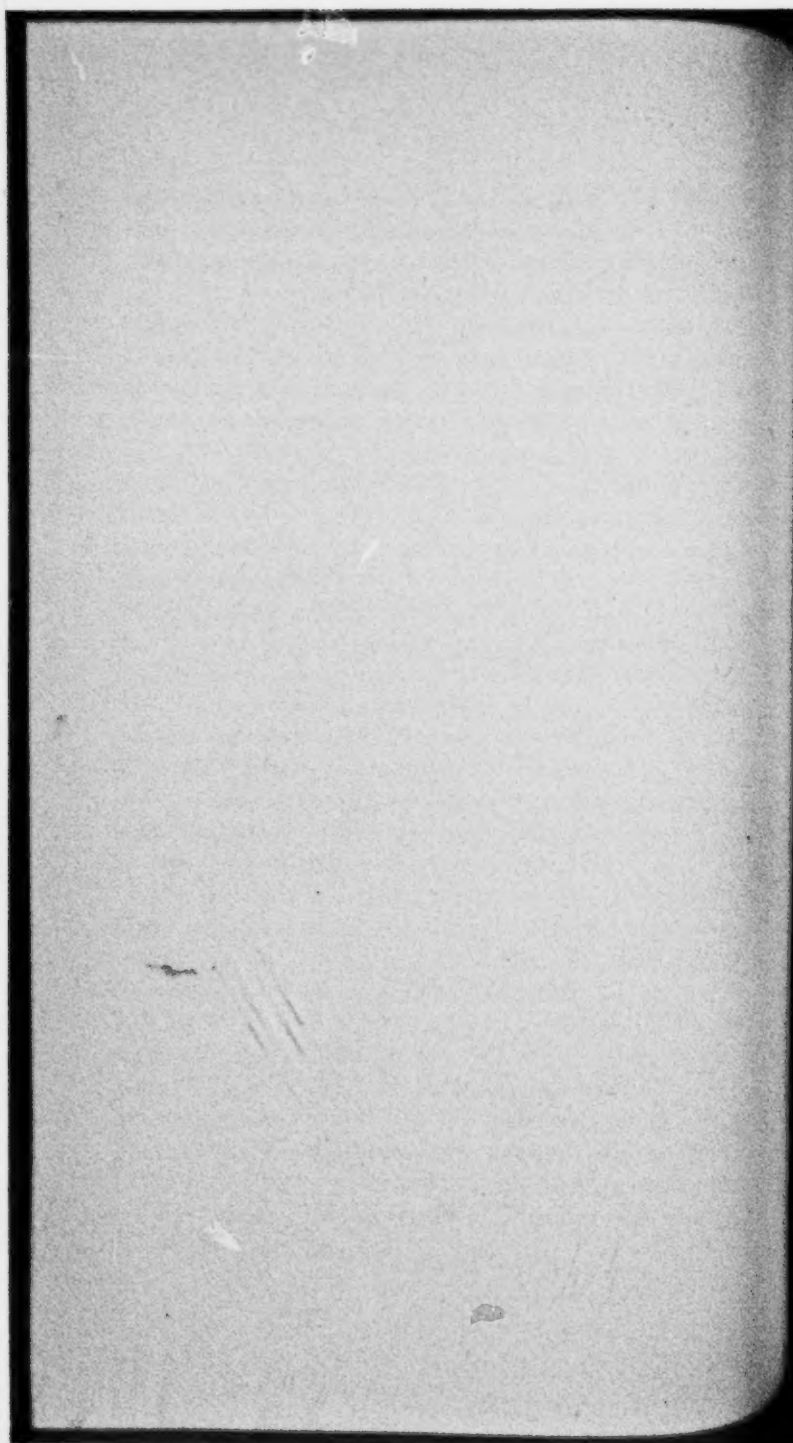
But in this case the original petition was not jurisdictionally defective; it might fail for lack of proof of many things, *e. g.*, that it was brought by three *bona fide* creditors. But it would have withstood a demurrer and an unopposed adjudication based thereon would have been perfectly valid.

But where the defect will appear only through failure of proof, *e. g.*, in respect of evidence of indebtedness, any qualified creditor or creditors may come in, pick up and carry forward the petition which its original proponents are not able or willing to do.

If it were otherwise it would often be an easy matter when four months had elapsed after the act of bankruptcy to induce or persuade one of the petitioning creditors to default upon his claim and thus avoid adjudication.

The exact point was decided in *Re Bolognesi*, 223 Fed., 772. We find nothing in *Re Triangle Co.*, 267 Fed., 300, opposed to this ruling, and in so far as some of the language in *Despres vs. Galbraith*, 213 Fed., 190, is to the contrary, we adhere to the opinion regarding that decision expressed in *Re Bolognesi*, *supra*.

Order affirmed with costs.



FILED

OCT 12 1923

WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 72

CANUTE STEAMSHIP COMPANY, LTD., and
COMPANIA NAVIERA SOTA Y AZNAR,
Petitioners,

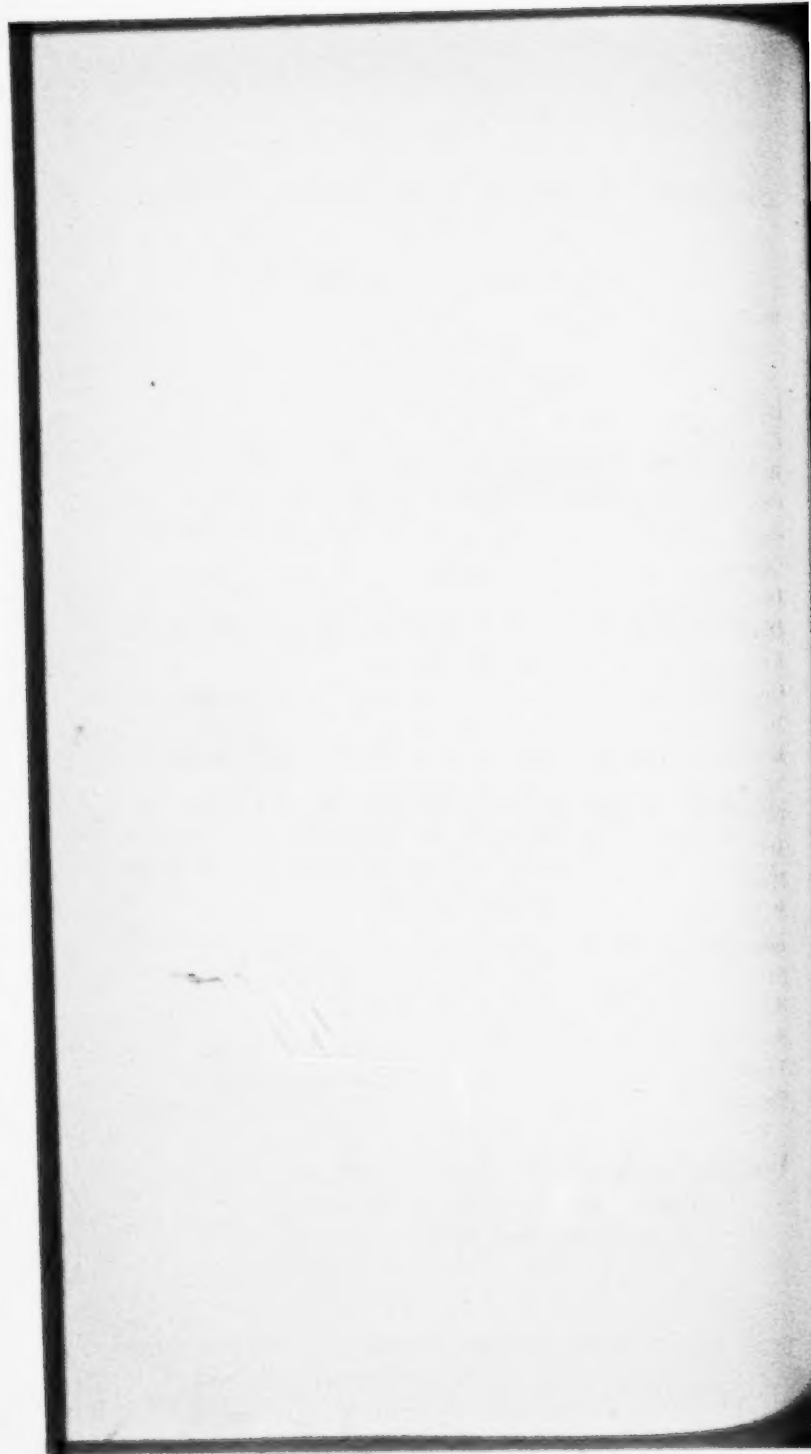
against

PITTSBURGH & WEST VIRGINIA COAL COMPANY,
et al.,
Respondents.

**BRIEF FOR RESPONDENTS JAMES E.
LAW AND ANTHONY F. McCUE, COPART-
NERS, AND THE MORGANTOWN COAL
COMPANY.**

JOHN W. DAVIS,
THEODORE KIENDL,
Counsel.

STETSON, JENNINGS & RUSSELL,
Attorneys for Petitioning
Intervening Respondents.



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Supreme Court of the United States

October Term, 1923.

CANUTE STEAMSHIP COMPANY,
LTD., and COMPANIA NAVIERA
SOTA Y AZNAR,

Petitioners,

against

PITTSBURGH & WEST VIRGINIA
COAL COMPANY, *et al.*,
Respondents.

No. 72

BRIEF FOR RESPONDENTS JAMES E. LAW AND ANTHONY F. McCUE, COPARTNERS, AND THE MOR- GANTOWN COAL COMPANY.

This is a contested bankruptcy proceeding brought before this Court pursuant to a writ of certiorari addressed to the Circuit Court of Appeals for the Second Circuit. The decision of the said Circuit Court of Appeals to be reviewed herein affirms an order of the United States District Court for the Southern District of New York adjudicating a bankrupt the Diamond Fuel Company, a Pennsylvania corporation (In re Diamond Fuel Company, 283 Fed. 108).

Statement of Facts.

An involuntary bankruptcy petition was filed on February 25, 1921, by three creditors of the Diamond Fuel Company, viz.: Pittsburgh & West

Virginia Coal Company, H. M. Crawford Coal Company, and Herman J. Poling, and Herbert S. Haller, doing business as the Boulder Coal Company. On September 19, 1921, certain other creditors, to wit, James E. Law and Anthony F. McCue, co-partners, and the Morgantown Coal Company, were granted leave by order of the District Court to intervene and were joined and made petitioning creditors in the original petition above mentioned (54).

The original petition sets forth, as the alleged act of bankruptcy, a preferential transfer of mining properties (1-24).

The alleged bankrupt originally filed an answer denying the commission of the alleged act of bankruptcy, and further denying that one of the petitioning creditors, the Pittsburgh & West Virginia Coal Company, had a provable claim (25-29).

On October 10, 1921, the Canute Steamship Company, Ltd., and Compania Naviera Sota Y Aznar intervened and were granted leave to file answers to the petition. The answers so filed by said alleged creditors (the petitioners in this Court hereinafter referred to as "Objecting Creditors"), were substantially identical with that of the alleged bankrupt (67-81). At the trial the alleged bankrupt formally withdrew its answer (434, 440), and in open court by its counsel consented to being adjudicated a bankrupt (434). The adjudication was therefore contested solely by the Objecting Creditors. The intervention of the Objecting Creditors and their opposition to the adjudication concededly was based on their desire to protect an alleged attachment lien which they had acquired in an Admiralty proceeding

in the United States District Court, for the District of Maryland, and to prevent the substantial funds so attached from becoming available to the general creditors of the alleged bankrupt's estate:

After a trial before District Judge Augustus N. Hand all the issues were resolved in favor of the creditors petitioning for an adjudication in bankruptcy. In its filed opinion the District Court found that the only original petitioning creditor (Pittsburgh & West Virginia Coal Company), whose claim was disputed was in fact a valid creditor, the transaction on which said claim was based having been fully recognized and ratified both by the bankrupt and by the Objecting Creditors (1229-1230). Said Court further found that in any event the intervening creditors with concededly provable claims, by their intervention validated the original petition from its inception if that were necessary (1231).

The United States Circuit Court of Appeals, for the Second Circuit, unanimously affirmed the District Court, on the ground that the intervention of qualified creditors more than four months after the act of bankruptcy cured the said alleged defect. In so deciding the Circuit Court of Appeals expressly refrained from deciding upon the disputed claim of the Pittsburgh & West Virginia Coal Company (1292-1294).

For convenience, the principal events in this proceeding may be summarized chronologically as follows:

On November 27, 1920, the alleged preferential transfer by the bankrupt, the Diamond Fuel Company, of its West Virginia properties took place.

On February 25, 1921, a petition in involuntary bankruptcy against the Diamond Fuel Company was filed by three creditors.

On September 19, 1921, an intervening petition in said proceeding was filed by the respondents Law and McCue and Morgantown Coal Company, under Sections 59-b and 59-f of the Bankruptcy Act.

On October 10, 1921, the petitioners here intervened in said proceeding as objecting creditors and filed an answer in opposition to the bankruptcy.

On March 6, 1922, an adjudication in bankruptcy was had after a trial on the merits in the United States District Court, for the Southern District of New York, and that adjudication was unanimously affirmed by the United States Circuit Court of Appeals, for the Second Circuit.

The principal, if not the only, question before this Court is whether or not the intervention of additional creditors petitioning for the bankruptcy adjudication cured the defect arising from the alleged failure of the Pittsburgh & West Virginia Coal Company (one of the three original petitioning creditors) to establish a provable claim. Hence we will assume for the major portion of our discussion that the claim of the Pittsburgh & West Virginia Coal Company was not established at the trial, although the District Court apparently decided otherwise and the Circuit Court of Appeals expressly refrained from deciding the point.

POINT I.

The original petition being sufficient upon its face, the required number of creditors and amount of claims may be reckoned by including the intervening petitioning creditors and their respective claims.

Petitioners' counsel argued in the lower courts that one of the three original petitioning creditors, viz.: Pittsburgh & West Virginia Coal Company failed to establish a "provable claim" and that consequently the original petition for an adjudication on the original petition filed on February 25, 1921, must necessarily fail in spite of the subsequent intervention of additional creditors seeking the adjudication. This contention, we submit, is contrary to the express language of the Bankruptcy Act and finds no support in the authorities.

Section 59-b of the Bankruptcy Act provides as follows:

"b. Three or more creditors who have provable claims against any person which amount in the aggregate in excess of the value of securities held by them, if any, to five hundred dollars or over; or, if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."

Section 59-f further provides:

"f. Creditors other than original petitioners may at any time enter their appearance

and join in the petition, or file an answer and be heard in opposition to the prayer of the petition."

In this connection Judge Hough, writing the opinion of the Circuit Court of Appeals in this case, stated as follows (1295):

"But in this case the original petition was not jurisdictionally defective; it might fail for lack of proof of many things, e. g., that it was brought by three bona fide creditors. But it would have withstood a demurrer and an unopposed adjudication thereon would have been perfectly valid.

But where the defect will appear only through failure of proof, e. g. in respect of evidence of indebtedness, any qualified creditor or creditors may come in, pick up and carry forward the petition which its original proponents are not able or willing to do."

This view is, we submit, in full accord with the decisions of the Federal courts dealing with the question.

In the cases of *In re John A. Etheridge*, 92 Fed. 329 (Ky.) and *In re Romanow*, 92 Fed. 510 (Mass.), it was expressly held that the requisite number of creditors having filed a petition in involuntary bankruptcy, other creditors having provable claims might intervene and join in the petition and that it is immaterial if the intervening creditors reckoned in making up the requisite number of creditors and amount of claims, joined in the proceeding more than four months after the act of bankruptcy was committed. In the *Romanow* case, the court stated as follows (page 511):

"Those who are permitted to 'join in' a petition, by so doing commonly become parties to it; and the words 'join in the petition' as used in paragraph e and paragraph b of the same section, plainly carry that implication. It is urged by the respondents that, if this construction be given to paragraph f, an insufficient number of creditors, or creditors having an insufficient amount of claims, may file a petition against a debtor, and obtain an adjudication by subsequently procuring other creditors to join with them, such joinder being possible at any time before the petition is dismissed. This practice, it is said, would permit a petition, at the time of its filing insufficient in substance as well as in form, to be made good by subsequent acts. It must be admitted that there is weight in this argument, but the language of the act is clear; and the inconvenience, if inconvenience there be, was not deemed by congress a controlling consideration in the act of 1867 (see Rev. St. §§5021, 5025), nor in some cases, at least, under the act of 1898. See section 59b. I think, therefore, that creditors, otherwise competent to appear and join in a petition subsequent to its filing, may be reckoned in making up the number of creditors and amount of claims required by section 59."

In the recent case of *In re Bolognesi*, 223 Fed. 772 (C. C. A. 2nd Cir. petition for writ of certiorari denied by this Court, 238 U. S. 639, decided June 21, 1915), Judge Lacombe said (p. 772):

"The original petition was undoubtedly valid on its face, and gave the court jurisdiction. *N. Y. Tunnel Co.*, 166 Fed. 284, 92 C. C. A. 202. When that petition was filed a proceeding became pending in the District Court, initiated in accordance with the statute, and in which creditors who had not par-

ticipated in its initiation were entitled to intervene. Bankruptcy Act, §59f. We do not think that the mere circumstance that their intervention came so long after the act of bankruptcy that they could not then have originated a proceeding, bars them from intervening in a pending proceeding; their adoption of the original petition related back to the date it was filed, because it was good and needed no amendment. Certainly the original proceeding cannot be held to be a void one, because facts may be shown in affirmative defense which may constitute an estoppel against the original petitioners taking advantage of the act of bankruptcy."

In the case of *In re Bedingfield*, 96 Fed. 190 (Ga.), it is clearly indicated that where in the first instance the petition is filed bona fide and is sufficient upon its face the court acquires jurisdiction of the proceeding which it retains until the matter is finally disposed of intervening creditors being permitted to supply one or more of the requisite provable claims. The Court states the rule as follows (page 192):

"It would be necessary in every case, of course, that a petition in involuntary bankruptcy should, on the face of it, show that creditors participated to the amount of \$500. before a petition could be filed, or a rule obtained; and these, of course, would have to be participating in good faith. Then, if afterwards, and before adjudication, it should appear that for some reason one or more of the petitioning creditors did not have debts, or their debts were not provable, and other creditors came in, sufficient to make the amount necessary, they could be allowed, and the proceeding stand. The Court would never entertain a mere sham petition pre-

pared originally with a view to doing this, but it would be only where a petition was brought in good faith, and some such contingency as has been referred to occurred."

In the case of *In re Stein*, 105 Fed. 749, 751 (C. C. A., 2nd Cir.), the Court, commenting on the joinder of additional petitioning parties, stated:

"And, even if imaginable cases of hardship may arise, the plain language of the act, authorizing creditors 'at any time' to join in the original petition, cannot be disregarded."

In the case of *In re Mackey*, 110 Fed. 355 (Del.), it was stated as follows (page 363):

"As insufficiency in the number of the petitioning creditors is not an incurable jurisdictional defect, by parity of reasoning insufficiency in the amount of provable claims of such creditors cannot be held such a defect; for the bankrupt act equally requires sufficiency in number and sufficiency in amount in order that the petition may be sustained. Clause 'f' was evidently intended to correct defects of either kind at any time during the pendency of the proceedings, whether before or after the expiration of four months from the alleged act of bankruptcy. This construction of the clause is in harmony with its language, is calculated to protect the interests of creditors, and involves no hardship to the defendant."

In the case of *In re Mammoth Pine Lumber Co.*, 109 Fed. 308 (Ark.), the Court refused to allow the original petitioning creditors to withdraw so as to discontinue a proceeding which they had instituted, on the ground that the jurisdiction

of the Court was perpetuated by the intervening creditors, page 311:

"There is no pretense in the case at bar that the Fort Smith creditors were sham creditors. When they filed this petition, they were acting in good faith, and antagonistic to the Mammouth Pine Lumber Company. So that on the face of the proceedings there can be no doubt, if the cases cited above are sound, the proceedings should stand, and the creditors who made themselves parties to the proceedings, after the expiration of the four months, should be taken into consideration in determining whether or not the necessary number of creditors and amount of indebtedness existed upon which the Mammouth Pine Lumber Company could be adjudicated a bankrupt."

The case of *Corwith Bank v. Haswell*, 174 Fed. 209 (C. C. A., 8th Cir.) is in point and expressly holds that an amendment to an involuntary petition whereby other creditors intervene and join therein relates back to the filing of the original petition and does not advance the date of its filing. In this connection the court uses the following language (page 210):

"The contention is that, as the original petition was defective for want of parties, the adjudication on that petition as amended, and the order relating the amendment back to the date of the original petition, was erroneous. The importance of this contention for the bank rests in this: If the 'filing of the petition' within the meaning of Section 60 of the bankruptcy act, concerning unlawful preferences, has relation to the filing of the original petition only, the preference which the bank received would be defeated, because less than

four months had then elapsed since it was given. If, on the contrary, it has relation to the filing of the amendment, as in this case, the preference would be protected, because more than four months had then elapsed.

"This contention is clearly untenable. Section 60a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445] as amended by Act Feb. 5, 1903, c. 487, §13, 32 Stat. 799 [U. S. Comp. St. Supp. 1909, p. 1314]), provides that:

*'A person shall be deemed to have given a preference if being insolvent he has within four months before the filing of the petition * * * made a transfer of any of his property,' etc. * * **

"The amendment as made in this case did not constitute 'the petition' within the meaning of Section 60. It did not by its terms purport to be a petition. It alleged no new act of bankruptcy. It consisted merely in striking out such allegations of the original petition and substituting such other allegations as were requisite to show the joinder of the necessary parties, authorized by Section 59d, and their status as creditors. The original petition then remained as if all the averments of the amendment had been bodily incorporated in it.

"Congress, by the provisions of Section 59, which seems to have been enacted to meet just such condition of things as is disclosed by this record, very manifestly intended, not that the original petition should be supplanted by the amendment there provided for, but that it might be supplemented by the joinder of other necessary creditors. This is made clear, not only by the provisions of subdivision "d", but by the provisions of subdivisions "e" and "f" of the same section. They

all contemplate the retention of the original petition as the pleading upon which subsequent proceedings should be had."

See also:

In re Lutfy, 156 Fed. 873 (N. Y.);
In re Vastbinder, 126 Fed. 417 (Penn.);
In re Crenshaw, 156 Fed. 638 (Ala.);
In re Smith, 176 Fed. 426 (N. D. N. Y.);
In re Charlestown Light, 183 Fed. 160 (W. Va.).

Concluding this phase of our discussion, we submit that the foregoing authorities satisfactorily demonstrate that the lower Court was correct in granting an adjudication even if one of the petitioning creditors was shown not to have a provable claim.

POINT II.

Other decisions considered and distinguished.

Counsel for the objecting creditors rely upon decisions which are not in conflict with the respondent's position herein but which without exception may be distinguished on their particular facts.

In *Despres v. Galbreath*, 213 Fed. 190 (C. C. A., 8th Cir.) an involuntary petition in bankruptcy alleged as an act of bankruptcy a general assignment for the benefit of creditors. Prior thereto all three petitioning creditors had accepted in writing the provisions of the assignment contract. Subsequently the alleged bankrupt answered and the referee to whom the matter was referred en-

tered an order dismissing the petition. Thereafter exceptions were filed to the referee's order, but no action was taken thereon by the Court until after three additional creditors had intervened. After the intervention an adjudication was entered by the Court. It was held that this adjudication related only to the intervening petition. Here again the distinction in principle is obvious. In the *Despres* case the original petitioners were estopped to file a petition in bankruptcy, having already participated in the assignment. In other words, the original petition was wholly void, the parties thereto being incapable of pursuing the remedy afforded by the bankruptcy Act. The distinction between this case and the case at bar is clearly recognized and expressed by the Court in its opinion, from which we quote the following statement (pages 192-193):

"[1, 2] The importance of the first contention rests in this: If 'the filing of the petition' within the meaning of the provisions of the bankruptcy act concerning unlawful preferences has relation to the filing of the petition by the three creditors on February 1st only, the preference, if it was a preference, which appellants received, would be defeated, for the reason that less than four months had elapsed since the last payment was made. If, on the contrary, it can have relation only to the filing of the intervening petition, the alleged preference would be protected because more than four months had then elapsed.

This brings us at once to consider what effect, if any, the filing of the petition on February 1, 1912, by the three creditors who were parties to the assignment contract, had upon the rights of the parties in interest here.

It has been repeatedly decided by this court that where a petition was defective merely, as, for example where a petition was filed by one creditor only who alleged that the debtor had less than twelve creditors known to him, and it was subsequently discovered that there were more than twelve creditors, and therefore the petition must be filed by more than one creditor, the requisite number of creditors might join with the original petitioner prior to adjudication, and that in such case the 'filing of the petition' within the meaning of the bankruptcy act would relate back to the date of the filing of the original petition by the one creditor. First State Bank v. Haswell, 174 Fed. 209, 98 C. C. A. 217, and cases there cited. In such case the petition will not be void but voidable only and subject to amendment. But we have here, as we view it, a very different case. The three creditors filing the first petition were absolutely disqualified from filing an involuntary petition in bankruptcy by reason of becoming voluntary parties to the assignment contract, as much so as if they had been strangers to the entire proceeding, and it would not be contended, we take it, by any one, that strangers—that is, parties having no claims against a bankrupt—could file a petition against him that would have any validity whatever. The reason given in the cases for denying to one who has become a voluntary party to an assignment contract the right to file an involuntary petition in bankruptcy, basing it upon the assignment as an act of bankruptcy, is that to permit him to do so would be to permit him to take advantage of his own wrong and enable the unscrupulous to entrap a person into involuntary bankruptcy; and it is for this reason that a person who has placed himself in that position is uniformly held to be estopped to set up an assignment

for the benefit of creditors as a ground for adjudging the assignor a bankrupt. This rule does not in any degree tend to affect or defeat the object of the bankruptcy law, for, as was said by Judge Taft in *Simonson v. Sinsheimer*, 95 Fed. 948, 37 C. C. A. 337:

'The estoppel we are considering, if recognized and enforced, does not affect or detract from the paramount character of bankruptcy proceedings, when properly begun, but only prevents the institution of such proceedings by persons who were privy to the act of which they complain, and on which they found their prayer for an adjudication.'

The bankruptcy act authorizes the filing of a petition in bankruptcy by creditors of the bankrupt. If the creditors are less than twelve in number, one creditor may file the petition; if more than twelve, then three or more creditors must join; but in both cases they must be creditors at the time the petition is filed. The three parties who signed the petition on February 1, 1912, were not, because of their assent to the assignment contract, creditors within the meaning of that term as used in the bankruptcy act and did not become such until after the order of adjudication."

The *Despres* case was commented upon by Judge Lacombe in the case *In re Bolognesi*, 223 Fed. 771 (C. C. A. 2nd Cir.) to which we have already referred:

"If the opinion in *Despres v. Galbraith*, 32 Am. Bank. R. 170, 213 Fed. 190, in which the court seems to have held that the original petition was void, be construed to hold that intervention under a valid petition, four months after the act of bankruptcy and before the original proceeding was dismissed, gives the interveners no right to proceed, we cannot concur. The case at bar is not within

the principle of *United States v. McCord*, 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. 893, because here there was 'no vice in the original suit.' The original petition was a valid one, under which bankruptcy could have been adjudicated, except for the interposition of an affirmative defense of estoppel."

This comment we submit is entirely applicable to the case at bar and effectually disposes of the *Despres* case without the necessity of further argument on our part.

There are other instances wherein the original petition has been held "void" and not to confer jurisdiction upon the Court. In these cases as in the foregoing, it has been held that the addition of intervening creditors could only confer jurisdiction upon the Court as of the date of filing the intervening petition if at all. Where, for example, the petition shows upon its face that there is an insufficient number of petitioning parties, the petition is void. In *Manning v. Evans*, 156 Fed. 106 (N. J.), the Court stated as follows (page 109):

"In the present case, the petition in bankruptcy was defective on its face. There was no averment that the creditors were less than 12 in number, and they were in fact more than 12. While there were three petitioners, the fact averred showed that only one of them was a creditor. In law, therefore, there was but one petitioner.

• • • • •

The filing of a petition in bankruptcy is notice to all the world. If, on its face, it appears to be in proper form, creditors who do not join in it are entitled to rely upon it as a good petition."

It has also been held that where intervening parties have become creditors by assignment, subsequent to the filing of the original petition, they cannot be reckoned in support thereof, since to hold otherwise might in effect sanction "an attempt to create artificially a new condition for the specific purpose of defeating the carefully prepared scheme of the bankruptcy statutes." (*Stroheim v. Perry*, 175 Fed. 52, at page 54 (C. C. A. 1st Cir.)

See also

In re Kehoe, 233 Fed. 415 (C. C. A. 2nd Cir.)

As repeatedly suggested by the courts, a petition insufficient on its face is not notice to the world of the pendency of a bankruptcy proceeding as contemplated by the Act. A subsequent *amendment* cannot retroactively supply such notice and the proceeding is void from its inception. Such cases, however, are governed by principles wholly foreign to the case at bar. The following cases doubtless relied upon by the objecting creditors will serve to illustrate the distinction.

In the case of *In re Triangle S. S. Co.*, 267 Fed. 300, 303 (S. D. N. Y.), the following situation was presented: An involuntary petition in bankruptcy was filed against the Triangle S. S. Co. purporting to allege an act of bankruptcy to the effect that the alleged bankrupt, with intent to prefer, paid \$500,000 upon "indebtedness" to the Foreign Trade Banking Corporation, a creditor, and upon other indebtedness to other creditors. The petition was demurred to and the demurrer sustained by Judge Learned Hand on the ground

that the allegations of the petition were too indefinite and failed to set forth an act of bankruptcy (*supra*, pages 300-302). Subsequently an amended petition was filed and a demurrer again sustained by Judge Mayer on the ground that the transfers specifically referred to in the amended petition were made more than four months prior to the filing of the *amended petition*, although less than four months prior to the filing of the *original petition*.

The Court referred to the situation in the following language (*supra*, page 303) :

"The original petition was held demurrable because the petition failed to set forth acts of bankruptcy. The present petition sets forth allegations as to acts of bankruptcy within the four-months period referred to in Section 3b of the Bankruptcy Act (Comp. St. §9587). It will be assumed, although not decided, that the petition sufficiently alleges the acts complained of. The amended petition recites that 'within four months next preceding the date of this petition, and while insolvent,' the alleged bankrupt 'committed acts of bankruptcy as follows.' It thereupon sets out the exact language contained in the original petition as defining the acts of bankruptcy, numbering them I and II. It then recites :

"That the particulars of the transfers set forth in paragraphs I and II are more particularly alleged and specified as follows."

"The transactions then set forth are the only ones specifically stated to have occurred more than four months prior to the filing of the amended petition, but apparently within four months prior to the filing of the original petition. The question, then, is whether, for the purpose of calculating the four months, the date is that of the original or of the amended petition."

and decided that the demurrer should be upheld on the authority of *In re Havens*, 255 Fed. 478 (C. C. A., 2nd Cir.), and *In re Louisell Lumber Co.*, 209 Fed. 784 (C. C. A., 5th Cir.), wherein substantially similar facts were presented.

From the foregoing discussion of *In re Triangle S. S. Co.* (*supra*) it is clear that the case has nothing whatever to do with the situation of facts presented in the case at bar. The decision in the *Triangle S. S. Co.* case depended entirely upon the fact that the original petition was insufficient upon its face whereas in the case at bar it has not been and could not be successfully urged that the petition herein is in any respects defective.

In like manner it is clear that where a petition originally valid has been formally dismissed, it cannot be revitalized by the intervention of new parties. The reason for this is obvious. A proceeding which has been concluded of record ceases to be such notice to the world as the Bankruptcy Act contemplates. Here again the cases are not in conflict with the respondent's contentions. A situation of this character was presented in the case of *Trammell v. Yarbrough*, 254 Fed. 685 (C. C. A. 5th Cir.), and more recently in the case of *In re Glory Bottling Co.*, 283 Fed. 110 (C. C. A. 2nd Cir.), wherein Circuit Judge Mayer (a member of the Circuit Court which decided the case at bar) held that where a petition had been abandoned such default could not be opened and a so-called amended petition was dismissed, the Court stating (p. 112):

"The case at bar is entirely distinguishable from that class of cases where a petition has not been dismissed, and is pending, but leave has been given to amend the petition; and

it is also distinguishable from those cases where creditors have intervened, as in *In re Bolognesi*, 223 Fed. 772, 139 C. C. A. 351, and *In re Diamond Fuel Co.*, 283 Fed. 108, decided contemporaneously herewith. There may also be cases where, through some accident or mistake, a petition is dismissed. For instance, there may be an inadvertent default when a cause is called for trial upon the issues raised by a petition in involuntary bankruptcy and the answer thereto. In such circumstances the court, of course, would have the ordinary powers possessed by the court in other causes, and might open the default in the exercise of a sound discretion.

Where, however, a petition, as here, was insufficient, and leave was granted to the petitioners to amend, and the petition was then deliberately abandoned by failure to conform with the conditions upon which amendment was permitted, we hold that there is no power in the District Court to order that such default be opened, and that a so-called amended petition be filed in place of the abandoned insufficient petition."

None of the foregoing cases, we submit, are adverse to the respondent's position. In the case at bar the original petitioners filed a *bona fide* petition, sufficient on its face. Additional petitioning parties entered the proceeding while the same was in full force and effect. Their intervention justified the decision below, irrespective of the claim of the Pittsburgh & West Virginia Coal Company.

POINT III.

The answering creditors are estopped to contest the claim of the Pittsburgh and West Virginia Coal Co.

Heretofore we have assumed for the purpose of argument that the claim of the Pittsburgh & West Virginia Coal Company, one of the three original petitioners was not established. The fact in the matter we believe to be otherwise.

This claim is based upon an overshipment of 18 carloads of coal to the Diamond Fuel Company which the latter agreed to accept and pay for (108).

The answering creditors have attempted to show that the 18 carloads in question were not accepted or utilized by the bankrupt, that title thereto never passed to the Diamond Fuel Co., and that consequently no implied obligation arose on the part of the bankrupt to pay the reasonable value thereof. The testimony in the case indicates that the Diamond Fuel Co. accepted these 18 carloads of coal although the price per ton was never finally settled and the coal never reached its destination (849-855). Irrespective of other considerations we would urge upon this Court that the objecting creditors are finally estopped by their own conduct to assert that these 18 carloads were not the property of the bankrupt. It is to be borne in mind that the Diamond Fuel Company withdrew its opposition to the adjudication. Hence these objecting creditors are the only parties against which the allegations of the involuntary petition must be established.

The facts in this connection are that the 18 carloads of coal left the mines at or about the date when an attachment was sued out by the answering creditors in their admiralty action against the Diamond Coal Company in the Maryland District Court on October 27, 1920 (888-890). These 18 carloads on arriving at the Baltimore coal piers "ran right into that attachment" (868) and were sold as part of the property of the Diamond Fuel Company subject to that attachment, the proceeds of the sale being held in *custodia legis*. It appears that these particular carloads of coal were consigned to the Tidewater Coal Exchange for the account of the Diamond Fuel Company and that the objecting creditors attached all coal so consigned (892-894), including these eighteen carloads. Having so attached this coal the objecting creditors successfully asserted to the United States District Court for the District of Maryland that this coal belonged to the Diamond Fuel Company and hence should be sold to satisfy their attachment in an action brought against the Diamond Fuel Company. Can these same parties now urge that the Diamond Fuel Company never took title to this coal and hence was never obligated to the Pittsburgh & West Virginia Coal Company to pay the reasonable value therefor?

Not until confronted at the trial with these two irreconcilable positions did counsel for the objecting creditors state grudgingly to the court that his clients were willing to release the attachment in question insofar as it concerned these eighteen carloads:

"The Court: It is true that you claim a right to attach the proceeds of these eighteen

carloads of coal that were shipped by Long & Co?

Mr. Hickox: It is a fact that I will not make any claim if it be shown that any portion of this property attached consisted of eighteen carloads of coal shipped by Long & Company consigned to the Diamond Fuel Company." (890)

We submit that this suggestion of relinquishing this coal or the proceeds thereof held under the attachment comes too late to avail the objecting creditors. They cannot be permitted to assert when it is to their advantage that these carloads of coal were owned by the Diamond Fuel Company and the converse when it is desirable to secure an advantage over the general creditors of that company. In this connection the District Court stated in its opinion:

"Only one of them, the Pittsburgh & West Virginia Coal Company is said not to be a valid creditor. Its claim is for 18 cars of coal shipped by mistake. If there is any claim arising out of such a transaction it is in quasi contract by reason of unjust enrichment. Mr. Barrett testified to an admission by the vice-president of the Diamond Fuel Company that it had accepted this coal, but admitted that the parties could not agree as to the price. *The objecting creditors attached this coal by process of foreign attachment in a suit in admiralty against the Diamond Fuel Company, and sold it with other coal in that proceeding. I think it is too late after taking such a step to offer at the trial to release their attachment against the 18 carloads, or their proceeds. They cannot restore the parties to their original position by returning the coal sold under their process in admiralty and the Diamond Fuel Company has never attempted to do this and by withdrawing its answer has rati-*

fied the transaction so far as possible. *The 15 car loads ordered by the Pittsburgh & West Virginia Coal Company were embraced in the shipment of the 18 cars sent by mistake, have never been paid for, and were likewise apparently sold to satisfy the decree in admiralty of the objecting creditors*" (1229-1230).

We submit that the doctrine of estoppel has repeatedly been applied in analogous situations where to do otherwise would cause hardship and injustice. In *Despres vs. Galbraith*, 213 Fed. 190, the Court refused to allow creditors to petition for an adjudication who had theretofore become voluntary parties to an assignment for the benefit of creditors. The reasoning of this decision is, we submit, applicable in the case at bar.

The objecting creditors in this proceeding are not in a position to argue that this coal did not actually become the property of the Diamond Fuel Company. They attached it, necessarily, *on that very theory*, and are estopped from reversing their position to their advantage and from now maintaining that the coal in question was at all times the property of the Pittsburgh & West Virginia Company.

In conclusion we submit that all the equitable considerations favor an adjudication. It is conceded that the sole opposition is raised by creditors who seek to perpetuate an attachment lien acquired within four months preceding the filing of the original petition to the decided disadvantage of the general creditors. A contest for this purpose has been properly characterized as "an abuse of the statute" and should be regarded by this Court with disfavor.

In the case of *In re Billing*, 145 Fed. 395 (Ala.), page 402, the Court stated as follows:

"It was not within the contemplation of the statute when the debtor is, in fact, insolvent, and has committed an act of bankruptcy, to give to the creditor the right to contest the adjudication, merely to keep alive a lien or levy, which would be destroyed if the petition be not defeated; for that is contrary to the spirit and purpose of the bankruptcy law. The contest of the petition for the latter purpose is an abuse of the statute."

We therefore submit that the Trial Court correctly found that these creditors were estopped to deny that the Diamond Fuel Company took title to the 18 carloads comprising the overshipment of coal and that the Diamond Fuel Company definitely ratified the transaction by the withdrawal of its answer previously offered in opposition to the adjudication.

POINT IV.

The judgment of the Circuit Court of Appeals should be in all respects affirmed.

Respectfully submitted,

JOHN W. DAVIS,
THEODORE KIENDL,
Counsel.

STETSON, JENNINGS & RUSSELL,
Attorneys for Petitioning
Intervening Respondents.

FILED
OCT 8 1923

WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 72.

CANUTE STEAMSHIP COMPANY, LTD., and
COMPANIA NAVIERA SOTA Y AZNAR,

Petitioners,

VS.

PITTSBURGH AND WEST VIRGINIA COAL
COMPANY, *et al.*,

Respondents.

BRIEF OF RECEIVER IN BEHALF OF GENERAL CREDITORS.

STIRES & BARRON,
Attorneys for Receiver.

BERNARD S. BARRON,
of Counsel.

REPORT OF THE

1892

1. The first part of the report is a general statement of the work done during the year.

2. The second part is a detailed account of the work done in each of the departments.

3. The third part is a summary of the results of the work done during the year.

4.

5. The fourth part is a statement of the financial condition of the institution.

6. The fifth part is a statement of the property of the institution.

7. The sixth part is a statement of the personnel of the institution.

8. The seventh part is a statement of the work done during the year.

9. The eighth part is a statement of the results of the work done during the year.

10. The ninth part is a statement of the financial condition of the institution.

11. The tenth part is a statement of the property of the institution.

12. The eleventh part is a statement of the personnel of the institution.

13. The twelfth part is a statement of the work done during the year.

14. The thirteenth part is a statement of the results of the work done during the year.

15. The fourteenth part is a statement of the financial condition of the institution.

16. The fifteenth part is a statement of the property of the institution.

17. The sixteenth part is a statement of the personnel of the institution.

18. The seventeenth part is a statement of the work done during the year.

19. The eighteenth part is a statement of the results of the work done during the year.

20. The nineteenth part is a statement of the financial condition of the institution.

21. The twentieth part is a statement of the property of the institution.

22. The twenty-first part is a statement of the personnel of the institution.

23. The twenty-second part is a statement of the work done during the year.

24. The twenty-third part is a statement of the results of the work done during the year.

25. The twenty-fourth part is a statement of the financial condition of the institution.

26. The twenty-fifth part is a statement of the property of the institution.

27. The twenty-sixth part is a statement of the personnel of the institution.

28. The twenty-seventh part is a statement of the work done during the year.

29. The twenty-eighth part is a statement of the results of the work done during the year.

30. The twenty-ninth part is a statement of the financial condition of the institution.

31. The thirtieth part is a statement of the property of the institution.

32. The thirty-first part is a statement of the personnel of the institution.

33. The thirty-second part is a statement of the work done during the year.

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Supreme Court of the United States

CANUTE STEAMSHIP COMPANY,
LTD., and COMPANIA NAVIERA
SOTA Y. AZNAR,

Petitioners,

against

PITTSBURGH & WEST VIRGINIA
COAL Co., *et al.*,
Respondents.

October Term,
1923—No. 72.

BRIEF OF RECEIVER IN BEHALF OF GENERAL CREDITORS.

This proceeding reaches this Court on a writ of certiorari to review an order of the Circuit Court of Appeals for the Second Circuit, affirming an order of the United States District Court for the Southern District of New York, adjudicating the Diamond Fuel Company, a bankrupt.

THE DIAMOND FUEL COMPANY IS THE ADJUDICATED
BANKRUPT.

The petitioners herein are answering creditors who intervened for the purpose of contesting the adjudication of the Diamond Fuel Company so that an appreciable portion of the estate, in excess of \$100,000, which they had attached at Baltimore

would remain their property to the exclusion and detriment of general creditors.

The respondents herein are the petitioning creditors who originally sought the adjudication in bankruptcy.

The intervening creditors who joined in the petition for adjudication are Law & McCue, a partnership, and Morgantown Coal Company.

In the cause of clarity and brevity the above will hereafter be respectively referred to as "the bankrupt company", "the petitioners", "the respondents" and "the intervening creditors."

Statement of Proceedings in Lower Courts.

On February 25, 1921, an involuntary petition in bankruptcy was filed in the Southern District of New York against the Diamond Fuel Company. The petitioning creditors were Pittsburgh & West Virginia Coal Company, H. M. Crawford Coal Company and Boulder Coal Company. The petition duly alleged the insolvency of the Diamond Fuel Company; a preferential transfer while insolvent and set forth the claims of the petitioning creditors in excess of \$500 (fols. 1-15).

On February 25, 1923, John B. Johnston, Esq., was appointed Receiver and duly qualified.

The Diamond Fuel Company, on or about March 3, 1921, filed an answer denying the allegations of the petition and disclaiming any indebtedness whatsoever to the Pittsburgh & West Virginia Coal Company (fols. 25-30).

On September 19, 1921, through leave of the Court by order duly made and entered, Law & McCue and Morgantown Coal Company were

joined as petitioning creditors and filed an intervening petition substantially embodying the allegations of the original petition (fols. 39-42).

On or about September 30, 1921, by permission of the Court, the petitioners herein filed an answer to the original petition and also to the intervening petition of the intervening creditors (fols. 67-73; 82-89).

On January 16th, 1922, the trial of the case commenced. Counsel for the Diamond Fuel Company offered in evidence an original resolution of the Board of Directors of the Diamond Fuel Company authorizing the withdrawal of its answer and consenting to an adjudication on the grounds stated in the original petition (fol. 434). On motion of the attorney for the Diamond Fuel Company the answer was permitted to be withdrawn (fol. 438).

The trial thereupon proceeded upon the issues raised by the answer of the petitioners herein. The District Court rendered an opinion ordering adjudication and an order was thereupon duly entered March 6, 1922. Petitioners then took an appeal to the Circuit Court of Appeals for the Second Circuit. The adjudication was affirmed in an opinion of Hough, C. J., writing for a unanimous Court.

A petition for a writ of certiorari was thereafter made to this Court which was granted and the proceedings are now before this Honorable Court on said writ.

The Facts.

The learned counsel for the petitioners have labored assiduously by quotations of isolated statements of the trial Judge and disconnected excerpts

from the evidence to prove that the Pittsburgh & West Virginia Coal Company did not have a provable claim.

On the erroneous theory that they have established this as a fact, they proceed then in an endeavor to assert and establish a rule of law which would practically nullify the effect of the sections of the Bankruptcy Act involved and which would overturn long settled legal propositions.

The fanciful fabric of their attenuated argument is destroyed *in toto* with the simple statement of the following:

(a) The District Court decided in favor of adjudication and found as a fact that the Pittsburgh & West Virginia Coal Company's claim was a valid one (fol. 1230).

(b) The Circuit Court of Appeals has affirmed this decision on the facts and the law.

(c) Respondent's Exhibit 6, a letter from the Baltimore & Ohio Railroad Company, to Stires & Barron, dated December 20, 1920, shows that the identical cars charged by the Pittsburgh & West Virginia Coal Company to the Diamond Fuel Company in its invoices were actually received at Curtis Bay Piers, were unloaded there and went out empty. The statement of the witness Stires (fol. 788) in no way controverted by the petitioners, is to the effect that Watson, the Treasurer of the Diamond Fuel Company, offered to pay \$5 a ton for the coal thus delivered.

(d) *This very coal, so delivered, was part of the coal attached by the petitioners in Baltimore and against which they seek to retain their lien by contesting this adjudication. They are in the anomol-*

ous position, therefore, where in one breath they contend there was no delivery of coal and hence no provable claim, and in the next take this very coal under attachment and seek to preserve it for the purpose of satisfying their claim therefrom.

From the above it is readily seen that the Pittsburgh & West Virginia Coal Company at all times had a valid and provable claim. It has been so found by all the Courts who have passed upon the facts involved in the case.

Our learned adversaries in their brief lay much stress on the language of the opinion of the Circuit Court of Appeals in the instant case in that they claim that the Circuit Court of Appeals did not decide that the Pittsburgh & West Virginia Coal Company had a valid proof of claim. There is no such determination in the decision. The Court very distinctly says (fol. 1292) :

"The result was that at the trial there were three or more undoubted creditors demanding adjudication."

Naturally the query presented by the petitioners was answered by the Court in its opinion and since their query was based on assumption, the Court said (fol. 1293) :

"We will assume (but not decide) that one of the three parties who swore to the original petition as creditors was not in point of fact a creditor at all."

The Court, in using this language, made it clear by using the words "but not decide," that this assumption on their part was solely for the purpose of answering the contention of the petitioner and

certainly there is nothing in the opinion to indicate that the Circuit Court of Appeals held that the claim of the Pittsburgh & West Virginia Coal Co. was not a valid one.

From the standpoint of the appeal, we must start then with the premise that the Pittsburgh & West Virginia Coal Company had a provable claim. While it is true that under the decisions this is immaterial, it must be borne in mind that counsel for the petitioners in endeavoring to sustain the prelude to their arguments, must prove first that the claim in question was invalid. It is simply to show that the contention of the petitioners' counsel is based on fallacy rather than substance, that the overwhelming proof is advanced of the sustained provability of the claim of the Pittsburgh & West Virginia Coal Company.

For the purpose of this appeal, we reiterate—the aforesaid claim stands unimpeached and valid.

The question raised by the petitioners in this Court, namely—"where an involuntary petition in bankruptcy is filed by three creditors, one of whom is proved not to be a creditor, is the petition jurisdictionally defective?"—is academic rather than material, for that question is not presented by the undisputed facts in the case.

Since the petitioners raise the question, however, and incorporate therein the aforementioned erroneous assumption, the answer to it is three-fold.

FIRST.—The facts of the case conclusively prove that all the petitioning creditors have valid claims.

SECOND.—The courts have consistently held that even if one petitioning creditor is not in reality a creditor, the intervention of a creditor with a provable claim validates the petition *ab initio* and

THIRD.—That such a petition is not jurisdictionally defective.

POINT ONE.

The original petition being valid on its face, even if it be assumed (though not conceded) that one claim was invalid, is not jurisdictionally defective and may be validated by the intervention of other creditors with provable claims.

Before discussing sub-divisions b and f of Section 59 of the Bankruptcy Act of July 1st, 1898, Chapter 541, as amended, which are applicable to the question under consideration, the facts which give rise to the same will first be discussed.

On February 25, 1921, three petitioning creditors of the Diamond Fuel Company, filed a petition in bankruptcy against it. This petition was in every respect valid on its face and would have withstood demurrer. The petition alleged the insolvency of the company, the commission of a preferential transfer while insolvent and contained the names of three petitioners whose claims aggregated more than \$500. On or about March 3rd, 1921, the Diamond Fuel Company filed its answer, denying the allegations of the petition and affirmatively setting forth the contention that the Pittsburgh & West Virginia Coal Company was not a creditor of the Diamond Fuel Company.

Thereafter Law & McCue and the Morgantown Coal Company, on or about September 14, 1921, intervened by order of the Court and joined the proceedings in conjunction with the respondents herein. The petition of Law & McCue (fol. 38) shows that they had a claim for legal services and advice rendered from August 8, 1918, to September

29, 1920, and that no part of the claim for \$2,742.50 had been paid.

It will be noted that the intervening creditors with valid claims became parties to the proceedings *before* the petitioners herein, seeking to sustain a lien which they had obtained against the property of the Diamond Fuel Company, joined with the Diamond Fuel Company on September 30, 1921, in an endeavor to resist the adjudication and thus sustain their lien. That the petitioners herein concede by inference the validity of the intervention of Law & McCue, is evidenced by the fact that in their answer to the petition of Law & McCue they raise no contention of jurisdictional defect, nor of the propriety of the intervention, but instead, deny (fol. 88) "that the intervening petitioners herein or either of them have provable claims against the alleged bankrupt and allege that the alleged bankrupt does not owe said intervening petitioners any sum whatsoever." From the pleading of the petitioners, therefore, it is evident that they recognize that the intervention of Law & McCue was valid and that the only way in which they could possibly hope to resist the adjudication of the Diamond Fuel Company was:

(a) To contest the validity of the claim of the Pittsburgh & West Virginia Coal Company; and

(b) To contest the validity of the claim of Law & McCue and the Morgantown Coal Company.

The record is barren of any proof on the part of the petitioners herein that the claim of Law & McCue was an invalid one, and it therefore must stand as a claim proven and admitted; nor have the petitioners submitted an iota of proof to show that the claim of the Pittsburgh & West Virginia

Coal Company was without merit. While it is immaterial (as we will hereafter point out) whether the claim of the Pittsburgh & West Virginia Coal Company was valid or not (and the proof and findings are conclusive that it was) it is, nevertheless, clear from the pleading of the petitioners, that they recognized that the intervention of Law & McCue validated the proceedings and it is equally apparent that the contention that they now raise in this court is very much an afterthought, fanciful rather than real, and raised, not for the purpose of benefiting all the creditors, but solely in an endeavor to sustain a lien and thereby take unto themselves an appreciable portion of the bankrupt company's estate for the benefit of themselves and to the detriment of other general creditors. This, in itself, under the decisions cannot be sustained.

In re Billing, 17 A. B. R., 89, 145 Fed., 395, 402, the Court said, speaking of Section 59, subdivision f, of the Bankruptcy Act:

"This provision intended to arm the creditor with effective means, placed directly in his own keeping, of assisting the debtor to resist an improper effort to force him into bankruptcy, and also to give the creditor like effectual means of preventing his debtor and petitioning creditors from colluding to bring about the adjudication, when the debtor is not insolvent and has not committed an act of bankruptcy, and is unwilling to institute voluntary proceedings. It was not within the contemplation of the statute when the debtor is, in fact, insolvent, and has committed an act of bankruptcy, to give to the creditor the

right to contest the adjudication, merely to keep alive a lien or levy, which would be destroyed if the petition be not defeated; for that is contrary to the spirit and purpose of the bankrupt law. The contest of the petition for the latter purpose is an abuse of the statute."

Since the company admits its insolvency and since, concededly, the petitioners herein contest or seek to contest the adjudication solely for the purpose of maintaining their lien of attachment in Baltimore, the answer is obvious that their contention cannot be sustained.

Bearing in mind that Law & McCue intervened on September 14, 1921, and the petitioners herein did not intervene for the purpose of contesting the adjudication until September 30, 1921, after Law & McCue had already become parties to the proceedings, they are in the anomalous situation where they contend that they have the right to intervene for the purpose of contesting the adjudication but deny to other intervening creditors, who were parties to the proceedings before they became such, the right to intervene for the purpose of sustaining the adjudication. Certainly such a contention would lead to a construction of the Bankruptcy Act entirely contrary to its spirit and violative of its every beneficial provision.

It must be remembered that on the day of the trial, the Diamond Fuel Company, by a resolution of its Board of Directors and on motion of its attorneys and by the order of the court, withdrew its answer to the original petition and thereby admitted all the allegations of the petitioning creditors. Since in its answer it denied the validity of the claim of the Pittsburgh & West Virginia Coal

Company, by withdrawing its answer, it thereby conceded the validity of the claim of the Pittsburgh & West Virginia Coal Company. The petitioners herein are, therefore, in the position where the debtor acknowledges its indebtedness on a contract or quasi contract and where they, as third parties, strangers to the contract or quasi contract, deny the indebtedness. Certainly such a position is untenable.

In the case of *Billings, supra*, the Court said (page 401) :

"The provision of the statute giving a creditor a right to resist the petition of other creditors to force their common debtor into bankruptcy, unless the debtor be insolvent and has committed an act of bankruptcy, is part and parcel of the same statute which gives that same debtor, whether he be solvent or insolvent, and whether or not he has committed an act of bankruptcy, the absolute right, at his own election, to be adjudged a bankrupt upon his own petition, whether or not his creditors consent, and whatever may be the effect of the adjudication upon their rights. These provisions are in *pari materia*. Thus construed, the provision allowing the creditor to contest the involuntary proceeding cannot be held to take from the alleged bankrupt the right or privilege, if he chooses to exercise it, of withdrawing his defense after it is begun, to an involuntary petition, or, for that matter, filing a voluntary petition while the involuntary petition is still pending against him. In *Re Stegar* (D. C.), 113 Fed., 978."

It is evident from the case above cited that the Diamond Fuel Company would have had the right, irrespective of the intervention of the petitioners, to file a voluntary petition in bankruptcy and thus bring about its own adjudication. With this in mind, it is obvious that the withdrawal of the answer by the Diamond Fuel Company vitiated the right of the petitioners to contest the adjudication in bankruptcy unless their answer alleged, or the contention was raised by them, that the withdrawal of the answer was the consequence of fraud or collusion between the alleged bankrupt and its petitioning creditors. No such charge is made and no such proof has been offered in the instant case. It is obvious, therefore, that the intervention of the petitioners can be of no avail.

We come then to a consideration of sub-divisions b and f of Section 59 of the Bankruptcy Act which read as follows:

"b: Three or more creditors who have provable claims against any person which amount in the aggregate in excess of the value of securities held by them, if any, to Five Hundred Dollars or over; or if all of the creditors of such person are less than twelve in number then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."

"f: Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition."

These sections of the Bankruptcy Act have been before the Federal Courts for construction time and time again and all the decisions thereon are harmonious with the possible exception of the case of *Despres vs. Galbraith*, 213 Fed., 190, which is clearly distinguishable from the facts involved in the case at bar and which will be hereafter discussed. The decisions held:

(a) That a petition, valid on its face, may be validated *ab initio* in the event of a failure of proof.

(b) That failure to have sufficient petitioning creditors in number or amount is not an incurable jurisdictional defect; and

(c) That under subdivision f of Section 59 of the Bankruptcy Act, creditors other than original petitioners, may at any time enter their appearance and join in the petition. The language of subdivision f is clear and explicit and the courts have held that "any time" means just that and nothing less.

In *re Charles Town Light & Power Co.*, 183 Fed., 160, the Court said (page 162):

"Under this provision it is now well settled that creditors may join at any time before adjudication, even though it be more than four months after the act of bankruptcy was committed, and will be counted to make up the number of creditors and the amount of claims required by the act."

The Court said, *In re Crenshaw*, 156 Fed., 638, page 639:

"Creditors other than the original petitioners may, at any time, enter their appearance and join in the petition, and creditors so joining in a petition subsequent to its filing may be reckoned in making up the number of creditors and amount of claims required by the act to support the petition."

In re Romanow, 92 Fed., 510 (pages 511-512), the following language is employed.

"Those who are permitted to 'join in' a petition, by so doing commonly become parties to it; and the words 'join in the petition,' as used in paragraph e and paragraph b of the same section, plainly carry that implication. It is urged by the respondents that, if this construction be given to paragraph f, an insufficient number of creditors, or creditors having an insufficient amount of claims, may file a petition against a debtor, and obtain an adjudication by subsequently procuring other creditors to join with them, such joinder being possible at any time before the petition is dismissed. This practice, it is said, would permit a petition, at the time of its filing insufficient in substance as well as in form, to be made good by subsequent acts. It must be admitted that there is weight in this argument, but the language of the act is clear; and the inconvenience, if inconvenience there be, was not deemed by Congress a controlling consideration in the act of 1867 (see Rev. St., §§5021, 5025), nor in some cases, at least, under the act of 1898. See section 59b. I think, therefore, that creditors, otherwise competent to appear and join in a

petition subsequent to its filing, may be reckoned in making up the number of creditors and amount of claims required by section 59."

That intervening creditors may at any time become parties to a petition, actually defective, but valid on its face, is shown by the following decisions:

In re *Stein*, 105 Fed., 749, 751:

"It is urged that to permit other creditors to procure an adjudication who have not sought to do so until after four months have elapsed since the act of bankruptcy would enable them to overhaul conveyances and sales as fraudulent or preferential which could not be done otherwise, and might work injustice to those whose titles had by lapse of time become safe. Nothing in the bankrupt act indicates a solicitude for the protection of fraudulent vendees, and, if creditors whose preferences may be disturbed have any equities to urge against an adjudication, they are authorized by section 59 to intervene and present them. And, even if imaginable cases of hardship may arise, the plain language of the act, authorizing creditors 'at any time' to join in the original petition, cannot be disregarded."

In re *Mammouth Pine Lumber Co.*, 109 Fed., 308 (pages 310-311):

"The intervention of the State National Bank of Oklahoma within the four months after the execution of the deed of trust, whereby it adopted the petition of the Ft. Smith

creditors, made that petition its own as much as if it had been originally filed by the Oklahoma bank. So that, if it were conceded that the Ft. Smith creditors had no provable claims against the bankrupt, the petition of the Ft. Smith creditors, which was adopted by the State National Bank of Oklahoma, still remained, and the Court was called upon to determine whether or not, upon its petition, the Mammoth Pine Lumber Company could be adjudicated a bankrupt. Conceding, for the purpose of the argument, that the Mammoth Pine Lumber Company could not be adjudicated a bankrupt upon the sole application of the State National Bank of Oklahoma, the question then arises whether or not, if, subsequent to the expiration of the four months, other creditors united in the petition of the Oklahoma bank sufficient in number and amount, the Court would still retain jurisdiction, and might proceed to the determination of the question as to whether the Mammoth Pine Lumber Company should be adjudicated a bankrupt. Upon this question we are not without authority. In the third edition of Collier on Bankruptcy, at page 330, the author says:

'It seems to be the rule that where, upon the filing of an involuntary petition in bankruptcy, there are not the proper number of petitioning creditors, or sufficient amount of claims to support the petition, but subsequently, and before the adjudication, other creditors enter their appearance, and join in the petition, such creditors and the amounts of their claim will be reckoned in making up the number of the

creditors and the amount of claims necessary to support an involuntary petition in bankruptcy. In *re Romanow* (D. C.), 1 Am. Bankr. R., 461, 92 Fed., 510. It was also held in this case that, where there were not a proper number of petitioning creditors, nor a sufficient amount of claims to support the petition, but subsequently, and before the adjudication, but more than four months after the act of bankruptcy, other creditors entered their appearance, and joined in the petition, the petition is valid, and the adjudication may be had upon it, as it is immaterial when the other creditors join in the petition, since it was filed within the four months after the commission of the act of bankruptcy by the insolvent debtor. But a later case (*In re Beddingfield* (D. C.), 2 Am. Bankr. R., 355, 96 Fed., 190) limits the practice to cases where apparently the original petition represented a sufficient number of creditors and claims and conferred jurisdiction.'

"It will be seen that on the face of the petition in this case there was apparently a sufficient number of creditors and a sufficient amount of indebtedness to enable the Court to adjudicate the Mammouth Pine Lumber Company a bankrupt in the event they all had provable claims, so that both of the above cases cited support the case at bar. The same author, at page 331, states that:

" 'In the case of *In re Mercur* (D. C.) 2 Am. Bankr. R., 626, 95 Fed., 634, the rule was clearly laid down that, where but one creditor has made a petition to his debtor to be adjudicated a bankrupt, alleging that the creditors

are less than twelve in number, when in fact there are more than twelve, other creditors may be allowed to join in the petition, and the original petition may be amended, even though the amended petition sets up an act of bankruptcy other than that alleged in the original petition.'

There is no pretense in the case at bar that the Ft. Smith creditors were sham creditors. When they filed this petition, they were acting in good faith, and antagonistic to the Mammoth Pine Lumber Company. So that on the face of the proceedings there can be no doubt, if the cases cited above are sound, the proceedings should stand, and the creditors who made themselves parties to the proceedings, after the expiration of the four months, should be taken into consideration in determining whether or not the necessary number of creditors and amount of indebtedness existed upon which the Mammoth Pine Lumber Company could be adjudicated a bankrupt."

In re Vastbinder, 126 Fed., 417 (pages 419-420) :

"It is urged, however, that as the original petition was insufficient, by reason of one of the petitioners being disqualified, it cannot be cured by the intervention of others; but that does not seem to be the law. The proceedings, as originally instituted, were formally sufficient; and even though some of the petitioning creditors were not, as argued, entitled to prosecute them, they nevertheless inured to the benefit of all, and others may unquestionably come in for the purpose of supplying any deficiency."

In re Mackey, 110 Fed., 355 (page 363) :

"This provision shows that insufficiency in the number of creditors was not regarded by Congress as an incurable jurisdictional defect. * * * It further shows that Congress intended that a joinder should be allowed prior to or during the hearing, whenever had. * * * As insufficiency in the number of the petitioning creditors is not an incurable jurisdictional defect, by parity of reasoning insufficiency in the amount of provable claims of such creditors cannot be held such a defect; for the bankrupt act equally requires sufficiency in number and sufficiency in amount in order that the petition may be sustained."

In re *Plymouth Cordage Co.*, 135 Fed., 1000 (page 1003) :

"In the first place, the uniform practice of the Federal Courts, founded on the public policy of the nation evidenced by acts of Congress and the rules of the Supreme Court, is to permit amendments in all judicial proceedings where they are necessary to enable parties to reach the merits of the controversy they attempt to present, and where the allowance of such amendments will work no injustice to any one. * * * Neither the act of Congress nor the rule in bankruptcy excepts jurisdictional averments from the power of the Court to permit amendments, and the established rule is that jurisdictional as well as other averments may be inserted or reformed by amendment. * * * Again, neither the

fact of the existence of twelve creditors at the time of the filing of the petition by a single creditor nor the averment of that fact is indispensable to the jurisdiction of the Court or to an adjudication of bankruptcy upon the petition under the bankruptcy law of 1898. It is only essential that there shall have been twelve creditors at the time of the filing of the petition, or that sufficient creditors shall have joined before the adjudication to make three in number whose claims amount in the aggregate to \$500."

The leading case on this question and one identical in every detail with the case at bar is in re *Bolognesi*, 223 Fed., 771. The rule of law there enunciated was followed by the Circuit Court of Appeals in the instant case and is, we submit, a proper construction of Section 59f of the bankruptcy act, in that it gives to bona fide creditors of a bankrupt the protection which the bankruptcy act has provided for them, and we respectfully submit that the adoption of the decision in that case by this Court will be in full keeping with the intent of the bankruptcy statute. The Court in that case said, page 772:

"The original petition was undoubtedly valid on its face, and gave the Court jurisdiction. *N. Y. Tunnel Co.*, 166 Fed., 284, 92 C. C. A., 202. When that petition was filed a proceeding became pending in the District Court, initiated in accordance with the statute, and in which creditors who had not participated in its initiation were entitled to intervene. Bankruptcy Act, §59f. We do not think

that the mere circumstance that their intervention came so long after the act of bankruptcy that they could not then have originated a proceeding bars them from intervening in a pending proceeding; their adoption of the original petition related back to the date it was filed, because it was good and needed no amendment. Certainly the original proceeding cannot be held to be a void one, because facts may be shown in affirmative defense which may constitute an estoppel against the original petitioners taking advantage of the act of bankruptcy."

"No doubt any petitioner may be allowed to withdraw, in the Court's discretion. If the original petitioners so withdraw before others intervene, that ends the proceeding completely; there is nothing left to intervene in. But until they do withdraw there is a proceeding, in which others may intervene; and if others have done so in the lifetime of the proceeding, subsequent withdrawal of the originators will leave the interveners free to proceed."

POINT TWO.

The cases cited by the petitioners are not analogous.

The cases cited by our adversaries are neither analogous nor are they in point. Their cases deal with situations where either the involuntary petition was dismissed prior to the intervention of other creditors or where an endeavor was made to fortify the original petition with an amendment

alleging a new act of bankruptcy. Our worthy opponents have failed to distinguish between "amendment" and "intervention" and, certainly, any decisions which do not involve the exact point in the case are of no value as against decisions directly in point.

Our adversaries in their endeavor, by attempted analogy, to sustain their untenable position have neglected to cite the following cases which are inconsistent with their contention and which would be overthrown if their theory is approved.

In re Charles Town Light & Power Co.,
183 Fed., 160;

In re Crenshaw, 156 Fed., 638;

In re Romanow, 92 Fed., 510;

In re Stein, 105 Fed., 749;

In re Mammoth Pine Lumber Co., 109
Fed., 308;

In re Vastbinder, 126 Fed., 417;

In re Mackey, 110 Fed., 355;

In re Plymouth Cordage Co., 135 Fed.,
1000;

In re Bolognesi, 223 Fed., 771;

In re Diamond Fuel Co., 283 Fed., 108,
and numerous others.

Despres vs. Galbraith, 213 Fed., 190, upon which our learned adversaries place considerable reliance, is clearly distinguishable in principle from the case at bar. In that decision the Court very clearly points out that the reason for denying other creditors the right to intervene and declaring the petition a nullity was that, if they did not do so, it would permit the original petitioning creditors, who were in reality not credi-

tors because they had assigned their claims, to take advantage of their own wrong, a fact which is not present in the case at bar. That this is the true construction of the Despres case is shown in the language of Collier on "Bankruptcy" in his 12th edition, page 856, where that learned author says—"nor will intervention be permitted where the original petition was signed by creditors who were estopped from filing a petition." Of course, there is no question of estoppel in the instant case nor any endeavor to take advantage of one's own improper act. While the Despres case is, as we have said, distinguishable from the case at bar, we nevertheless respectfully submit that it is not good law for the reason that even under circumstances as therein mentioned it might well be, and as a matter of fact is almost sure to be true, that other creditors who were bona fide creditors having provable claims, had a right to assume and undoubtedly did assume that the petition was filed in good faith and that the petitioning creditors were creditors having provable claims and therefore these other creditors refrained from filing a petition. If this decision were good law, it would mean that other creditors, through no act of their own, were denied the rights and benefits of the bankruptcy statute. This is contrary to the general theory of the Bankruptcy Act as set forth in the case of *In re Glory Bottling Co. of New York, Inc.*, 283 Fed., 110.

The Despres case was disapproved by the Circuit Court of Appeals for the Second Circuit *In re Bolognesi*, 223 Fed., 772, and in the decision of the same Court in the instant case, *In re Diamond Fuel Co.*, 283 Fed., 108.

Stripped of its fanciful argument and shorn of its verbosity, the contention of the petitioners tersely stated is this: If Law & McCue had joined in the original petition, in place of the Pittsburgh & West Virginia Coal Company, the original petition would have been valid and the petitioners could not have prevented the adjudication. The very statement of this contention is proof of its fallacy. The Bankruptcy Act does not provide that three designated creditors must file the petition, but instead permits that any three creditors may file the petition.

In re *Glory Bottling Co. of New York, Inc.* (283 Fed., 110, C. C. A., Second Circuit), the Court said:

"It must be remembered that the filing of a petition in bankruptcy does not concern only the petitioners and the bankrupt. By such filing there is set in motion the procedure of the Bankruptcy Statute, which affects the rights of all the creditors, and a bankruptcy petition may not be dismissed as a matter of course."

The Court, after citing section 59g of the Act, then says:

"This and other provisions of the statute demonstrate that, when a petition is filed, the relations between the petitioners and the alleged bankrupt are not those of ordinary parties to a litigation, but that the rights of all creditors enter and continue throughout the various proceedings."

At the time of the filing of the petition in bankruptcy, Law & McCue, the intervenors, were creditors of the Diamond Fuel Company with a valid and provable claim.

Certainly Law & McCue are not bound by the dereliction, if any, of the Pittsburgh & West Virginia Coal Company. Having had, under the law, the absolute right to join as a valid creditor in the first instance, such a right cannot be abrogated nor divested because of the fact that a creditor with an invalid claim took the place, in the original petition, of a creditor with a valid claim. That this is the true intent of the Bankruptcy Act is borne out by the language used therein in Section 59f which says that creditors other than the original petitioners may at any time enter their appearance and join in the petition. The language used, clearly makes provision for such emergencies as arose in the instant case. It would perhaps be superfluous to point out to the Court the vast possibilities of fraud and collusion which might be practiced if the rule were otherwise. Creditors such as the petitioners herein might arrange with certain other creditors of the alleged bankrupt to file an involuntary petition against it, which petition might contain a petitioning creditor with an invalid claim. They might then wait until four months after the commission of the act of bankruptcy and then for the first time raise the issue of the invalidity of the petition, thereby gaining an advantage over those other creditors which could not be cured. In effect it would destroy the entire meaning of sub-division f of Section 59.

This particular point was before the Court in the case of *In re Mackey*, 110 Fed., 355, and the contention there raised, which is similar to that

of the petitioners in this case, was overruled by Judge Bradford. The following is an excerpt from that opinion at page 363:

"This construction of the clause is in harmony with its language, is calculated to protect the interests of creditors, and involves no hardship to the defendant. On the other hand, to construe the provision according to the contention of the defendant would open the door to fraud and collusion between the defendant and petitioning creditors, and largely defeat the operation of the bankruptcy act, to the prejudice of the other creditors. No construction of the clause which in practice would permit the filing of a petition by pretended creditors or by creditors falsely or mistakenly representing provable claims to the requisite amount and the postponement of the hearing until after the expiration of four months from the alleged act of bankruptcy, and then, on the discovery at the hearing of insufficiency in number or in amount, exclude other creditors from joining in the petition and validating the proceedings, can be tolerated. For in such case it would be too late to file another petition for the same act of bankruptcy and bona fide creditors would be wholly deprived of the benefits of the bankruptcy act. Further, even, were the language of the clause less clear, the confusion, uncertainty and embarrassment in the settlement of a bankrupt's estate which necessarily would result from the construction contended for should cause any court to reject it."

The right of intervention being absolute under the statute, it must be held that the intervention of Law & McCue validated the petition from its inception and an adjudication thereunder was, therefore, proper.

POINT THREE.

The decision of the Circuit Court of Appeals was correct and should in all respects be affirmed by this Court.

STIREIS & BARRON,
Attorneys for the Receiver.

BERNARD S. BARRON,
of Counsel.

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The decision of the Circuit Court of Appeals for the Second Circuit should be reversed and the cause remanded with instructions to vacate the adjudication and dismiss the Petition in Bankruptcy.

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SUPREME COURT OF THE UNITED STATES.

CANUTE STEAMSHIP COMPANY, LTD.,
and COMPANIA NAVIERA SOTA Y
AZNAR,

Petitioners,

against

PITTSBURGH & WEST VIRGINIA COAL
COMPANY, *et al.*,

Respondents.

October Term,
1923.

No. 72.

BRIEF FOR PETITIONERS.

This proceeding is before the Court on a *writ of certiorari* to review an order of the Circuit Court of Appeals for the Second Circuit, affirming an adjudication in bankruptcy against Diamond Fuel Company by the District Court of the United States for the Southern District of New York.

The question involved in this proceeding is this:

Where the creditors of an alleged bankrupt exceed twelve in number and a petition in involuntary bankruptcy is filed by three alleged creditors, one of whom is proved not to be a creditor, is the petition jurisdictionally defective?

If such a defect exists, can the petition be made good as of its original date by an intervening petition of other creditors filed ten months after the only act of bankruptcy alleged?

THE PLEADINGS.

The petition in bankruptcy was filed on February 25th, 1921, by Pittsburgh & West Virginia Coal Company, H. M. Crawford Coal Company and Boulder Coal Company, who alleged that they had provable claims against the alleged bankrupt, Diamond Fuel Company, in an amount exceeding \$500.00. The allegation as to one petitioner was, fol. 7:

"The claim of petitioner, the Pittsburgh & West Virginia Coal Company, is for \$8225.10 for 18 cars of coal sold and delivered to the said Diamond Fuel Company on or about the 30th day of October, 1920."

The sole act of bankruptcy alleged was that the Diamond Fuel Company, while insolvent on November 27, 1920, made a transfer of certain real estate to certain creditors.

About March 3d, 1921, the alleged bankrupt filed a verified answer in which, among other things, it denied that Pittsburgh & West Virginia Coal Company had a provable claim against the Diamond Fuel Company. *Record*, fol. 29.

A Receiver was thereafter appointed but no further proceedings were had until September 19th, 1921, when, pursuant to an order of the District Court, two additional creditors, Law & McCue, a co-partnership, and Morgantown Coal Company were joined as petitioning creditors and were permitted to file an intervening petition which

in substance adopted the allegations of the original petition and did not allege any additional act of bankruptcy. *Record*, fols. 34-54.

On September 30th, 1921, the petitioners herein, creditors who had attached property of the Diamond Fuel Co. at Baltimore on October 27th, 1920, almost four months before the petition was filed, appeared in the proceeding, fols. 61-65, and filed answer to the intervening petition, fols. 82-96, and on October 10, 1921, under leave granted by the court, fols. 55-60, filed their answer to the original petition, fols. 67-81. These answers denied among other matters that Pittsburgh & West Virginia Coal Company was a creditor. Fol. 72.

For convenience the petitioners are referred to in this brief as answering creditors.

THE TRIAL.

The case went to trial before Judge A. N. Hand on January 16, 1922. The petitioning creditors moved to amend the petition by alleging that the Diamond Fuel Company had admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground. Fol. 429. That amendment was, however, withdrawn. Fols. 970-973.

The Diamond Fuel Company then withdrew its answer to the original petition and consented to an adjudication. Fols. 434, 438. The trial then proceeded on the issues raised by the answer of the answering creditors.

The petitioning creditors presented their proofs which included the testimony of the Secretary and Treasurer of the Diamond Fuel Company that according to the books of the Company, the Pittsburgh & West Virginia Coal Company was not a creditor. Fol. 497.

The petitioning creditors then rested and the case was stated by the Court to be closed. Fol. 659.

When it was pointed out on the argument that the petitioning creditors had not proved that the Pittsburgh & West Virginia Coal Company was a creditor, fols. 660, 671-675, counsel for petitioning creditors stated, fol. 672, that they could prove the claim at that time. The case was reopened and Thomas F. Barrett, one of the petitioning creditors' counsel, took the stand and attempted to support the claim by his own testimony. Fol. 676.

When it appeared that the witness could not prove the claim petitioning creditors' counsel asked for and obtained an adjournment until January 30, 1922. Fol. 695.

At the same time the Court directed that within five days particulars of the claim of Pittsburgh & West Virginia Coal Company should be furnished to counsel for answering creditors. The Court said, fols. 694-695:

"You will state how the contract was made, whether oral or in writing; and if in writing, produce a copy of the writing; if oral, state when and with whom, and the substance of the oral conversation, and if part one and part the other, combine the two features, and give it in a bill of particulars."

The petitioning creditors failed to give any bill of particulars within the five days prescribed by the Court. Nothing was done by them until January 26th, ten days after the adjournment of the trial, when they served the answering creditors herein with notice of taking depositions in Clarksburg, W. Va., on January 28th. The answering creditors objected to this proposed action and at a hearing before Judge Hand in his chambers on January 27th, Judge Hand directed that any witnesses whom the petitioning creditors might desire to examine should be brought to New York and that the petitioning creditors should furnish by January 28th the bill of particulars that should have been furnished seven days previously. Fols. 705-706.

Again the petitioning creditors failed to comply with the direction of the Court, and when the case was called on Monday, September 30th, the Court granted an adjournment until the next day and at the instance of the answering creditors directed that petitioning creditors should serve their bill of particulars by two o'clock on that date. The bill of particulars was actually served at five o'clock, fols. 704-707, too late to enable the petitioners herein to obtain from Philadelphia proofs to refute certain contentions of the petitioning creditors.

The particulars alleged by the petitioning creditors were entirely at variance with the allegations in the original petition and with the testimony given by Mr. Barrett at the trial on January 16th.

The original petition alleges that the claim of the Pittsburgh & West Virginia Coal Company was for 18

cars of coal sold and delivered to the Diamond Fuel Company on or about the 30th day of October, 1920. Fol. 7.

Mr. Barrett's testimony was to the effect that a written order for 29 car loads of coal had been received by the Pittsburgh & West Virginia Coal Company from the Diamond Fuel Company prior to October 29th. Fol. 679. This statement apparently was wholly untrue.

Quite a different sort of claim is alleged in the bill of particulars. There it is stated in substance that Moore & Company, wholesale coal dealers of Philadelphia, on the 29th of October, 1920, ordered from Pittsburgh & West Virginia Coal Company fifteen cars of coal and agreed to pay therefor \$9.00 per ton at the mine; that Moore & Company by telephone conversation with Mr. Tutt, Assistant Secretary of Pittsburgh & West Virginia Coal Company, stated that they were acting in the purchase of the coal for Diamond Fuel Company; that the order for fifteen cars of coal came from Moore & Company by telegram. The telegram, however, did not purport to place the order for Diamond Fuel Company but only for Moore & Company. Fols. 95-105.

The bill of particulars further alleges that after the order of Moore & Company, Pittsburgh & West Virginia Coal Company received an invoice from J. E. Long Coal Company of Clarksburg, West Virginia, for eighteen cars of coal consigned by that Company to Diamond Fuel Company, the eighteen cars of coal being in addition to the fifteen cars ordered by Moore & Company, and that the eighteen cars of coal went forward to Diamond Fuel Company by mistake. It further stated in substance

that thereafter an officer of the Diamond Fuel Company stated that the coal had been received, and that while he did not consider the Company was obligated to do so, it was willing to pay for the coal at four to five dollars per ton, but that Pittsburgh & West Virginia Coal Company refused to accept this proposition. Fols. 106-120.

The petitioning creditors offered hearsay testimony in support of the claim in the bill of particulars. On the most favorable view to petitioning creditors the utmost that can be said about it was that it indicated that 16 or 18 car loads of coal had been sent through error to Baltimore consigned to the Diamond Fuel Company.

Some of the 16 or 18 cars in question may have arrived in Baltimore to credit of Diamond Fuel Co. but that has not been proved, and according to the claim of the petitioning creditors the cars could not have arrived till after Oct. 29.

It is stipulated that all coal that arrived within the jurisdiction of the United States District Court in Baltimore to the credit of the Diamond Fuel Company on the 27th of October or thereafter was covered by the attachments made on behalf of the answering creditors in proceedings in admiralty in Baltimore. Fols. 888, 889.

The answering creditors do not concede, however, that any coal, property of the Pittsburgh & West Virginia Coal Company was covered by the attachment. They said at the trial that they did not claim the right to attach any portion of the 18 cars of coal if it could be shown that the coal had been shipped by Long & Company and by mistake consigned to the Diamond Fuel Company. Fol. 890.

It was stipulated at the trial, fol. 997, that final decrees in Admiralty had been rendered by the United States District Court of Maryland, wherein the answering creditors were adjudged to have a claim and a right to recover against the Diamond Fuel Company in the sum of \$165,000. These judgments have been affirmed on appeal, 1923, 288 Fed. Rep. 847, 848.

It was also stipulated at fol. 1002 that part of the claim covered by the judgment of the answering creditors is unsecured by attachment.

During the trial the view of the Court seemed to be that the petitioning creditors had failed to show that Pittsburgh & West Virginia Coal Company was a creditor. At fols. 855, 856, the Court said that the petitioners would have to show some kind of acceptance by the Diamond Fuel Company of coal sent to them by mistake through the Tidewater Coal Exchange.

Again at fol. 860 the Court said:

"You have got to show some acceptance here or an express contract and if you haven't got that you have got to prove that this company or these men who received the coal had promised to pay something or had used the coal or something of that sort."

At fols. 906-908 Judge Hand said that he did not think that an offer by Mr. Watson of the Diamond Fuel Company to pay a price which the others did not agree to take constituted any acceptance of the coal.

At fol. 892, the Court, referring to the attachment in Baltimore, said:

"The Pittsburgh & West Virginia Coal Company, if that is their coal, should go in and fight it."

At fol. 894, the Court said:

"What the Pittsburgh & West Virginia Coal Company should do is to get their interests in the proceeds of that coal determined. * * *"

At fol. 899 the Court said:

"I am inclined to think that the Pittsburgh & West Virginia Coal Company has not a good claim".

At fols. 906-907 the Court said of the coal in question:

"I do not see how the statement which Mr. Watson made that they had accepted it was binding when he did not offer to pay anything for it."

And at fol. 908 the Court expressed the opinion that title to the coal had not passed.

DECISION OF THE DISTRICT JUDGE.

Notwithstanding the foregoing, the opinion of the District Judge does not make a definite finding as to the ownership of the coal or whether or not the Pittsburgh & West Virginia Coal Company was a creditor. On the contrary the opinion suggests that on the assumption that the coal in question had been sold under the attachment of the answering creditors at Baltimore and because of the fact that the Diamond Fuel Company at the trial had withdrawn its answer to the original peti-

tion, it was too late to raise any question about the ownership of the coal.

The Court definitely found that any defect in the original petition was cured and made valid from its inception by reason of the intervening petition of creditors with good claims. Fol. 1231.

It is difficult to see how the action of the attorneys for the Diamond Fuel Company at the trial in withdrawing their answer could constitute to any extent a ratification of a transaction with which the Diamond Fuel Company had never had anything to do. They did not order the coal in question. They never got the benefit or use of it. They never agreed to buy it except at a price which was not accepted.

If the coal ever arrived at Baltimore and was covered by the attachment and if in fact the coal was not the property of the Diamond Fuel Company the action of the Marshal in attaching it was invalid and could be set aside in proper proceedings by the actual owner of the coal.

If in fact the Pittsburgh & West Virginia Coal Company was the owner of any portion of the coal that was attached at Baltimore they have their remedy, as the District Judge suggested during the trial, fols. 892, 894, in establishing their right against the proceeds of the coal.

This claim of the actual owner of the coal is one of *quasi* contract by reason of the unjust enrichment of somebody through getting the coal by mistake. The Diamond Fuel Company never was enriched by receipt of

the coal and was no more concerned with the transaction than any other stranger.

The Diamond Fuel Company could not be made a purchaser of the coal without its own consent and according to the record it never did consent to become a purchaser.

Certainly no action by the answering creditors in suing out an attachment could grant title to any coal to the Diamond Fuel Company.

We suggest, therefore, that the proofs establish that the Pittsburgh & West Virginia Coal Company was not a creditor of the Diamond Fuel Company and accordingly that the original petition was fatally and jurisdictionally defective because only two of the three parties named as creditors in fact were creditors.

DECISION OF THE CIRCUIT COURT OF APPEALS.

It is evident that the Court of Appeals was not satisfied that the Pittsburgh & West Virginia Coal Company was a creditor. The opinion states, fol. 1293:

“We will assume (but not decide) that one of the three parties who swore to the original petition as creditors, was not in point of fact a creditor at all. This means that the proof of indebtedness was insufficient but the allegation of indebtedness was in point of form perfect.”

The Court then found that because the petition was fair on its face it was not jurisdictionally defective and a failure to prove the truth of one of the allegations

with respect to indebtedness to a creditor could be remedied by the subsequent intervention of another creditor so as to make the petition good as of its original date. Fol. 1295.

Yet the Court also stated that an amendment inserting a new act of bankruptcy speaks only from the date of the amendment. Fol. 1294.

The substance and effect of the opinion of the Court of Appeals is simply this:

If the petitioning creditors in this case had stated the truth in their petition, it would have been jurisdictionally defective and would not have withstood a demurrer or could have been dismissed on motion because the requirements of the Statute that three creditors must petition would not have been met.

Yet because the petitioning creditors made an allegation of indebtedness which was in point of form perfect, but in point of fact false, they have been put by the court in a better position than if they had pleaded truly. The court has permitted the falsity of the original petition to be cured by the intervention of other creditors more than ten months after the commission of the act of bankruptcy on which all the petitioning creditors relied.

Clearly, a new petition by three creditors filed on the later date and relying on the same act of bankruptcy would have been jurisdictionally defective as not alleging an act of bankruptcy within four months of their petition.

Neither such creditors nor the original petitioning creditors should be permitted to profit by the false pleading originally filed.

The construction of the statute that was made in this case draws a distinction wholly indefensible in principle between the jurisdictional requirement of allegations with respect to acts of bankruptcy and allegations with respect to indebtedness to petitioning creditors.

If a necessary amendment alleging a new act of bankruptcy speaks only from the date of the amendment, so a necessary amendment or intervening petition containing new allegations of indebtedness should speak only from the date when it was made.

FIRST POINT.

THE ORIGINAL PETITION IS JURISDICTIONALLY DEFECTIVE AND IT CANNOT BE VALIDATED *ab initio* BY THE INTERVENTION OF OTHER CREDITORS MORE THAN FOUR MONTHS AFTER THE COMMISSION OF THE ALLEGED ACT OF BANKRUPTCY.

The question under discussion requires a consideration of Subdivisions (b) and (f) of Section 59 of the Bankruptcy Act of July 1, 1898, Chapter 541, as amended, which are as follows:

"b. Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over, or if all of the

creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."

"f. Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition."

The opinion of the Circuit Court of Appeals proceeded on this assumption, fol. 1293:

"We will assume (but not decide) that one of the three parties who swore to the original petition as creditors was not in point of fact a creditor at all. This means that the proof of indebtedness was not sufficient but the allegation of indebtedness was in point of form perfect."

The Court then said, fol. 1293 :

"The one question raised by this appeal is whether assuming such lack of proof on the part of one of the three petitioners, the suit or proceeding was validated by the addition of other petitioners who did prove that they were creditors after the expiration of the four months' period."

The Court then suggests that there is a distinction between an amendment or addition to a petition jurisdictionally defective and similar action in respect to a petition which is called jurisdictionally sufficient. Fol. 1294.

The language of the opinion indicates that the Court would consider a petition jurisdictionally sufficient if the allegations were correct in form, although unfounded

in fact. We suggest that this view cannot possibly be correct.

If a petition makes proper allegations of acts of bankruptcy which are entirely without foundation, as proofs only can determine, the petition then is shown to be jurisdictionally defective for it fails to contain the requisites specified by the statute.

In order that such a petition might become jurisdictionally sufficient it would be necessary to make a new allegation of an act of bankruptcy occurring not more than four months previously and establish such act of bankruptcy.

The Court states it as a rule and it is clearly settled that any amendment inserting a new act of bankruptcy speaks only from the date of the amendment. Fol. 1294. We suggest, therefore, that the statement of the opinion is not well founded where it says that the test of a jurisdictional defect is whether or not the petition would withstand a demurrer. Fol. 1295.

The bankruptcy statute must deal with the substance of things and not merely with the appearance. When the statute says that certain things must appear in a petition the requirement necessarily refers to things that really exist and not to mere statements of non-existing things.

A truthful and proper allegation of an actual act of bankruptcy within four months of the petition is one jurisdictional essential. Truthful and proper allegations with respect to three petitioning creditors are another jurisdictional essential. The Court of Appeals has assumed to draw a distinction between two essentials and

in effect has declared that a truthful allegation by three petitioning creditors is not an essential at all.

The requirements of the Bankruptcy Act for a petition in bankruptcy are the same with respect to creditors and the allegation of an act of bankruptcy.

Section 1(a), Subdivision 20, defines a petition as follows:

"Petition shall mean a paper filed in a court of bankruptcy * * * by creditors alleging the commission of an act of bankruptcy by a debtor therein named."

Section 1(a), Subdivision 9, defines the term creditor and Section 59(b) specifies the number of creditors so defined who must join in a petition in involuntary bankruptcy where the number of creditors is more than twelve.

Section 3(a) and 60(a) define what shall constitute an act of bankruptcy.

The intent of the Bankruptcy Act, therefore, appears to be that in order to constitute a valid petition in bankruptcy it is essential that it be filed by creditors as defined in the Act and that it shall allege an act of bankruptcy as defined in the Act. Unless both of these essentials exist there is no petition at all. The one is as important as the other and if the failure to allege an act of bankruptcy is a jurisdictional defect, the absence of the necessary number of petitioning creditors must be equally a jurisdictional defect.

If the provision of the Bankruptcy Act that three creditors shall join in a petition is jurisdictional and if one of the parties who have joined is not in fact a cred-

itor, the jurisdictional defect none the less exists although it may not be apparent on the surface. Such a defect would not be removed by the failure of the alleged bankrupt or an answering creditor to raise the question before adjudication. An adjudication in such circumstances would not be perfectly valid, but would be open to attack on jurisdictional grounds in any direct proceeding. The Court of Appeals appears to have lost sight of the distinction between such jurisdictional defects as will expose a judgment to collateral attack, and those which can only be attacked directly.

The situation is quite analogous to that of a suit brought in a Federal Court where the jurisdiction depends entirely on diversity of citizenship. The complaint would certainly not be demurrable if the allegations with respect to citizenship were proper, nor in the absence of fraud or collusion, would a judgment obtained in such action, after a hearing and determination of the issues, be open to collateral attack. *Des Moines Navigation, etc. Co. v. Iowa Homestead Co.*, 1887, 123 U. S. 552; *Noble v. Union River Logging Co.*, 1893, 147 U. S. 167; *Lacassagne v. Chapuis*, 1892, 144 U. S. 119; *New Orleans v. Fisher*, 1901, 180 U. S. 185. Nevertheless it cannot be doubted that the court would have to dismiss the suit for lack of jurisdiction, if the necessary diversity does not exist in fact, and the defect appears in the course of the proceedings.

The answering creditors submit that the requirement of the Bankruptcy Act that there shall be three petitioning creditors is a jurisdictional one with all its attributes. If the question is raised by answer before adjudication or

by any direct proceeding even after adjudication and it is established that less than three creditors have petitioned, the petition must fail for want of jurisdiction. That being true, the intervention of other creditors thereafter can validate the proceeding only from the time the petition becomes a sufficient one by such intervention.

The jurisdiction of the Bankruptcy Court is entirely dependent on the Statute, and to the extent that the provisions of the Statute are designed to take away vested rights, they should be strictly construed.

The answering creditors by virtue of their attachment proceedings at Baltimore obtained vested rights of property which in the ordinary course of law they would be entitled to enjoy; but if an adjudication in bankruptcy is upheld in accordance with the opinion of the Circuit Court of Appeals it will be associated by the trustee in bankruptcy that their attachments must fall by reason of the fact that they were obtained within four months of the filing of the petition in bankruptcy.

This is not a case in which one creditor has secured an advantage over other creditors by virtue of the consent or aid of the alleged bankrupt. But such advantages as have been obtained have resulted to the answering creditors by reason of their diligence in the assertion of their ordinary legal remedies. They should not be deprived of those rights through the medium of a drastic statute unless the specific requirements of the Statute are strictly complied with.

The bankruptcy act abrogates the ordinary rights of creditors in certain circumstances. As in the case of for-

eign attachment, garnishment and distress proceedings, parties should comply strictly with the requirements of the Statutes, if they are to invoke successfully the jurisdiction of the court. This feature of the law was pointed out by Hazel, J., in *In Re C. Moench & Sons*, W. D. N. Y. 1903, 123 Fed. 977, where, after discussing the rights of an attaching creditor to answer an involuntary petition, he said at page 978:

“Those rights are sought to be wrested from it pursuant to a Statute in derogation of his general common law rights, and cannot be wiped away without a hearing.”

It is settled law that the requirement of the Statute with respect to the number of petitioning creditors is jurisdictional.

In *Cutler v. Nu-Gold Ring Co.*, 264 Fed. 836, C. C. A. 8th Cir. 1920, Sanborn, J., at p. 838 said:

“ * * * the law is now settled beyond dispute that the existence of three provable claims held by three petitioners, respectively, of the alleged bankrupt, and, if challenged by pleading, plenary proof thereof is jurisdictional and indispensable to the maintenance of an involuntary petition in bankruptcy.”

The subsequent intervention almost ten months after the alleged act of bankruptcy of a sufficient number of qualified creditors cannot validate *ab initio* an involuntary petition which is jurisdictionally defective because of a deficiency of qualified petitioners.

The only possible theory on which the original petitioners and the intervening petitioners in this case can

proceed is that the original petition, though invalid as filed, is somehow rendered valid from the beginning by amendment or intervention. This theory must fail unless authorized by necessary implication from the express provisions of the statute.

If the jurisdictional requisites were in fact absent the original petition was a dead thing and had neither actual nor potential life. If this is not so then a petition filed by only one creditor, or indeed by three alleged creditors who are not proved to be creditors, becomes a perfectly good petition from the date when it was filed, if subsequently, no matter how long thereafter, two or more actual creditors intervene in the proceedings.

Respondents rely on Section 59f of the Bankruptcy Act which is as follows:

"Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition."

The joinder permitted by this section can only refer to an existing petition. If there is not any proceeding before the Court, as is the case where the petition is proved to be jurisdictionally defective, the intervention must stand, if at all, as a new proceeding. Section 59f merely confers on creditors a privilege to become parties, so that they may be represented at the trial of the issues and have a hand in carrying on a going litigation. It does not contain anything which contravenes the principle that parties plaintiff in a cause cannot by their own

action comply retroactively with jurisdictional requirements.

The proceeding in this case was a nullity until the intervening petition was filed. Then, for the first time, three qualified petitioning creditors were before the court.

These principles are supported by authority.

The decision by the Circuit Court of Appeals for the Eighth Circuit in *Despres v. Galbraith*, 1914, 213 Fed. 190, is directly in point. That was a case where an involuntary petition was filed by three creditors who had previously assented to a general assignment whereby they expressly released the alleged bankrupt from liability. More than four months later, an intervening petition was filed by three qualified creditors. The District Court ordered an adjudication as of the date of filing the original petition. The Circuit Court of Appeals held that the intervening petition must be considered as an original petition as of the date of the intervention that the adjudication could only be based on the intervening petition and that certain alleged preferences, given within four months of the filing of the original petition but more than four months before the intervening petition, could not be disturbed. At page 193, the Court said:

"The bankruptcy act authorizes the filing of a petition in bankruptcy by creditors of the bankrupt. If the creditors are less than twelve in number, one creditor may file the petition; if more than twelve, then three or more creditors must join; . . . We are of the opin-

ion that the petition of February 1, 1912, was void for the want of proper petitioners. That being true, the intervening petitions could draw no support from it."

Trammel v. Yarbrough, 1918, 254 Fed. 685, decided by the Circuit Court of Appeals for the Fifth Circuit, presented a situation closely analogous to the case at bar. There, an involuntary petition was dismissed for want of prosecution, but in the order of dismissal the right was reserved to any other creditors to intervene and have the matter reopened within thirty days. A sufficient number of qualified creditors intervened within the thirty days but more than four months after the act of bankruptcy alleged. The district court rendered an adjudication of bankruptcy. This was reversed. Walker, Circuit Judge, said at page 687:

"A reopening of the proceedings to let in other creditors to carry it on, after the elimination from it of all who had previously been actors in it, was in necessary effect the institution of a new proceeding."

The courts have applied a similar rule to cases where the original petition was defective as to its allegations of the act of bankruptcy.

In *In re Condon*, C. C. A., 1913, 209 Fed. 800, Judge Lacombe, after disposing of the original petition as being jurisdictionally defective because of the insufficiency of the allegations of the act of bankruptcy, said:

"Thereafter, on May 25, 1911, the petition was amended by setting forth the details of twelve separate transactions of the kind charged in the original peti-

tion. Since the petition became a sufficient one only when it was fortified with this amendment, the date of the amendment must be taken as the date from which the four months period of Section 3b is to be calculated. This eliminates all of said alleged transactions except the last four."

Judge Hough covered the same point by his observations in *In Re Havens*, C. C. A., 1918, 255 Fed. 478, 481:

"It was assumed below that this was an act of bankruptcy not set forth in the original petition and only charged in and by an amendment made more than four months after its commission. Whether such an act, occurring more than four months before amendment, could be introduced into a pending proceeding, was thought an 'interesting question' by Lacombe, J., in the Riggs case, *supra*.

"This court answered it in the negative, *In re Haff*, 136 Fed. 80, 68 C. C. A. 646, the matter not having been covered by *In re Sears*, 117 Fed. 294, 54 C. C. A. 532, which was correctly explained and limited in application by *Gleason v. Smith*, 145 Fed. 897, 75 C. C. A. 427. The general rule as stated in the Haff Case has been approved, especially in the Ninth Circuit (*Walker v. Woodside*, 164 Fed. 685, 90 C. C. A. 644), and in the Seventh (*In re Brown Commercial Car Co.*, 227 Fed. 390, 142 C. C. A. 83). Our own decision (*In re Condon*, 209 Fed. 801, 126 C. C. A. 524) is (in this respect) but a re-assertion of the Haff Case.

"This rule rests in theory upon the reasoning of Justice Nelson in *re Craft*, 6 Blatchf. 177, Fed. Case No. 3,317, where it was pointed out that 'to allow a substantial amendment—that is, one going to the whole foundation of the proceeding *nunc pro tunc*—would be a direct

violation of a limitation 'obviously for the benefit of the debtor,' namely, the requirement that proceedings must be brought within a limited time after the act of bankruptcy is committed; i. e., under the present statute, four months."

In the *Triangle Steamship Co.* case, 1920, 267 Fed. 303, a petition had been held defective for insufficiency of allegations of acts of bankruptcy. An amended petition was filed by the same petitioners. On demurrer this amended petition was dismissed. Judge Mayer said, p. 303:

"The transactions then set forth are the only ones specifically stated to have occurred more than four months prior to the filing of the amended petition but apparently within four months prior to the filing of the original petition. The question then is whether for the purpose of calculating the four months the date is that of the original or that of the amended petition.

"It is settled by authority."

Judge Mayer then quotes from the *Condon* and *Havens* cases and cites *In re Louisell Lumber Co.*, C. C. A. 5th Cir. 1913, 209 Fed. 784.

In *In re Louisell Lumber Company*, C. C. A. 5th Cir., 1913, 209 Fed. 784, the original petition was defective in failing to allege any act of bankruptcy as required by the statute. After more than seven months had gone by the creditors were permitted to amend their petition by setting up an act of bankruptcy consisting of an admission by the bankrupt of inability to pay debts. An adjudication was then entered and the trustees sought to

set aside a levy that had been made within four months of the filing of the original petition but more than four months before the filing of the amended petition. The Court of Appeals held that the amendments did not relate back to the time of filing of the original petition and that the attachment could not be set aside. The Court said, p. 787:

"But the doctrine of relation back is not applicable where the amendment sets up a new cause of action, or where to cause it to relate back would have the effect of depriving an adverse party of a substantial right on which no attack was made in the original pleading. * * *

"It would defeat the intention of the bankruptcy act if creditors could file a blank or skeleton petition against their debtor, alleging no act of bankruptcy, and, after a lapse of more than four months, amend it by filling up the blanks, alleging acts of bankruptcy, and have the amendment relate back in its effect for a period of over eight months to a time within four months before the filing of the blank petition, and dissolve valid liens then existing on the bankrupt's property. And it would clearly conflict with the act to permit such defective petition to be made effective by the debtor's acknowledgment of insolvency and willingness to be adjudicated a bankrupt, made by him over four months after such defective petition is filed, and cause such confession, when alleged by amendment, to relate back in its effect more than eight months so as to dissolve valid liens on the bankrupt's property then existing. If a petition alleging no act of bankruptcy may lie dormant for more than four months, and then by amendment be given retroactive vitality, cancelling liens made secure by the four months' limitation, the same effect would be given

the amendment of such a petition made twelve months after it was filed, thereby annulling liens that had attached sixteen months before the amendment. We cannot approve a procedure that leads to such results. It would be destructive of rights intended to be preserved by the four months' limitation."

It would be even more objectionable to permit persons who are not creditors to file a petition, allow it to remain dormant for more than six months, and then on the intervention of qualified creditors, to hold that the petition so amended took effect as of the time of the original defective petition was filed, with the consequences suggested in the language just quoted.

The Circuit Court of Appeals considered the case of *In re Bolognesi*, 223 Fed. 771, decided by it in 1915, a controlling authority against the contention of the attaching creditors. The actual decision on the facts of the case is not inconsistent with the principles we have pointed out above. From the facts stated by the court, it appears that, although the original petitioners were estopped by reason of their participation in a general assignment, other and qualified creditors intervened in the petition within four months of the act of bankruptcy. While the proceeding was in this condition, the intervention occurred by still other qualified creditors, more than four months after the act of bankruptcy. The proceeding was a valid one, therefore, when the latest group of creditors intervened. The District Court, considered that the petition should be dismissed on the ground that all the qualified creditors who had intervened within the four months' period had withdrawn,

and that jurisdiction attached only as of the time of the intervention of the creditors who remained in the case.

The reasoning of Judge Lacombe in that case also plainly shows that he considered that intervention in a void petition, more than four months after the act of bankruptcy alleged, could not save it. He took the position that the original petitioners were in law creditors who were capable of initiating proceedings and that there was a pending proceeding when the intervention occurred.

It may be that a creditor who has a valid claim against the alleged bankrupt has sufficient standing in an involuntary proceeding to be counted as one of the petitioning creditors, although he is estopped from relying on the alleged act of bankruptcy for an adjudication. Creditors not so estopped subsequently coming in at any time might rely on the act of bankruptcy so alleged.

If, however, the scope of the decision goes to the extent suggested by the Court of Appeals in this case, we submit that it is fundamentally wrong. If one non-existent creditor could join in an original petition with two actual creditors so as to make the petition valid at its inception, although not complying with the requirements of the Act, the same result would follow if two or all three petitioning creditors were not actual creditors.

Certainly the Bankruptcy Act cannot sanction the filing of a petition by bogus creditors whether the number be one, two or three. Yet such a result apparently would be possible under the decision of the Court of Appeals in this case, for they said, fol. 1295:

"But where the defect will appear only through failure of proof, e. g. in respect of evidence of indebtedness, any qualified creditor or creditors may come in, pick up and carry forward the petition which its original proponents are not able or willing to do."

The suggestion of the Court is not persuasive that otherwise it would often be an easy matter when four months had elapsed after the act of bankruptcy to induce or persuade one of the petitioning creditors to default upon his claim and thus avoid adjudication. That possibility, of course, may exist at any time whether it concerns the proof of indebtedness or the proof of an act of bankruptcy.

It would be a much more serious situation and one more provocative of fraud if bogus creditors could file a petition and more than four months after the act of bankruptcy complained of *bona fide* creditors could intervene and make good a petition as of a date when they had not acted.

The answering creditors submit that the construction of the Bankruptcy Act made by the Court of Appeals for the Eighth Circuit in *Despres v. Galbraith* and by the Court of Appeals for the Fifth Circuit in *Trammell v. Yarrowborough* is correct in principle and should prevail over the ruling by the Court of Appeals in the present case.

LAST POINT.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE REVERSED AND THE CAUSE REMANDED WITH INSTRUCTIONS TO VACATE THE ADJUDICATION AND DISMISS THE PETITION IN BANKRUPTCY.

Respectfully submitted,

CHARLES R. HICKOX,
D. M. TIBBETTS,
Counsel for Answering Creditors.

OCT 8 1923

WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

—
No. 72
—

CANUTE STEAMSHIP COMPANY, LTD., AND COMPANIA
NAVIERA SOTA Y AZNAR, *Petitioners,*

VS.

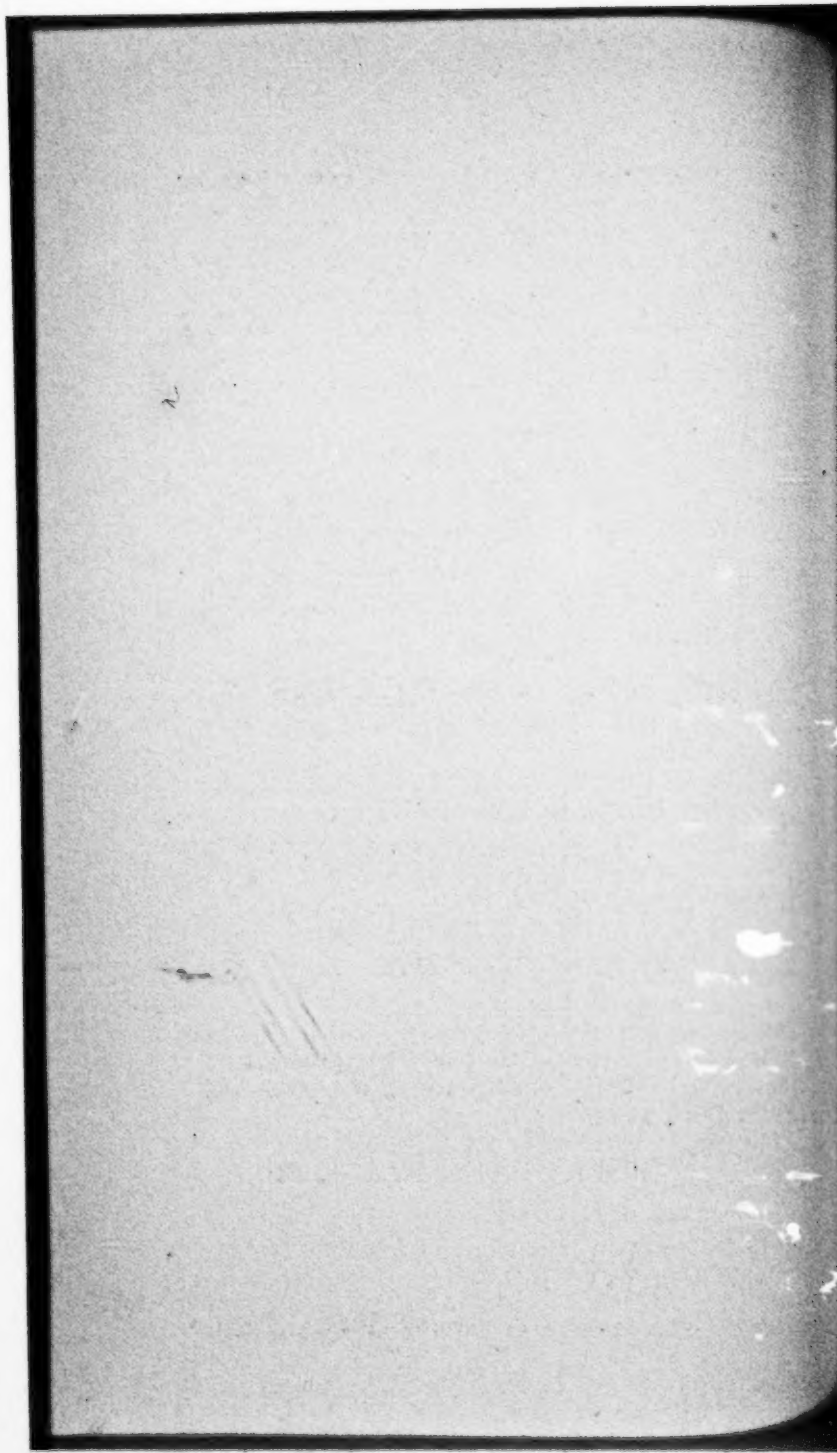
PITTSBURGH AND WEST VIRGINIA COAL COMPANY ET AL.,
Respondents.

—
ON WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT
—

BRIEF FOR RESPONDENTS.

—
THOS. F. BARRETT,
Attorney for Respondents.

NASH ROCKWOOD,
R. H. McNEILL,
R. R. BENNETT,
T. L. JEFFORDS,
of Counsel.

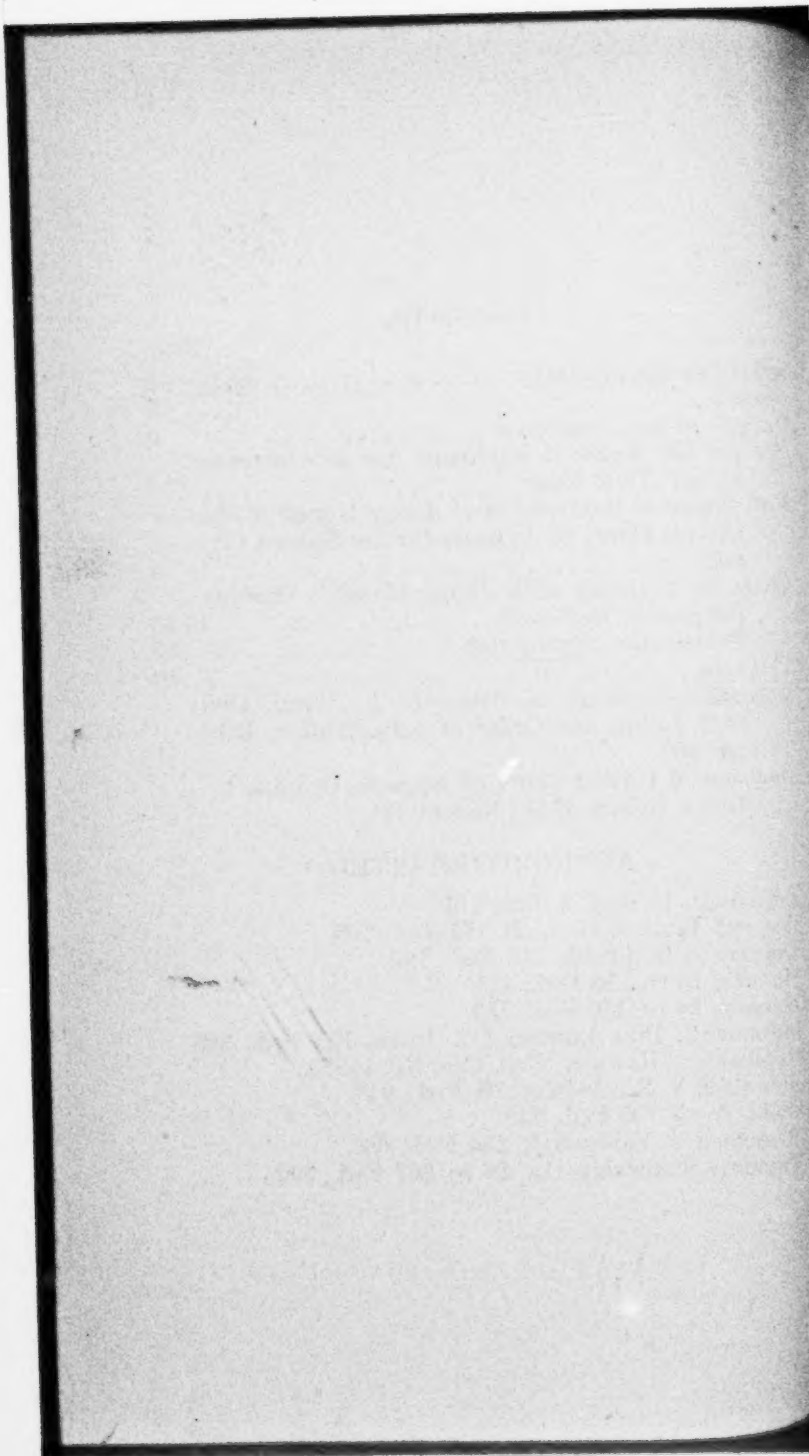


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AUTHORITIES CITED.

Bolognesi. In re, 223 Fed., 771.
 Corv n Bank v. Haswell, 174 Fed., 209.
 Despres v. Galbraith, 213 Fed., 190.
 Havens, in re, 255 Fed., 478.
 Mackey. In re, 110 Fed., 355.
 Mammoth Pine Lumber Co., In re, 109 Fed., 308.
 Robinson v. Hanway, Fed. Cas. No. 11953.
 Simonson v. Sinsheimer, 95 Fed., 948.
 Stein, In re, 105 Fed., 749.
 Trammell v. Yarbrough, 254 Fed., 685.
 Triangle Steamship Co., In re, 267 Fed., 300.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1923

No. 72

CANUTE STEAMSHIP COMPANY, LTD., AND COMPANIA
NAVIERA SOTA Y AZNAR, *Petitioners,*

AGAINST

PITTSBURGH AND WEST VIRGINIA COAL COMPANY ET AL.,
Respondents.

BRIEF FOR RESPONDENTS

Pittsburgh and West Virginia Coal Company, H. M.
Crawford Coal Company and Boulder Coal Company.

The matter sought to be reviewed is an order of adjudication entered by Judge Augustus N. Hand, a judge of the United States District Court for the Southern District of New York, in the above-entitled cause, and unanimously affirmed by the Circuit Court of Appeals for the Second Circuit, with Hough, Manton and Mayer, J. J., sitting, opinion by Hough, J.

FACTS

1. Prior to October 27, A. D. 1920, the alleged bankrupt was engaged in the business of mining and shipping coal from coal mines owned by it, located in West Virginia, and in purchasing coal from other coal operators for export. Its principal office was located at 25 West 43d Street, in the City of New York.

2. On the 27th day of October, A. D. 1920, the Canute Steamship Company, Ltd., and Compania Naviera Sota y Aznar (the petitioners) instituted in the United States District Court for the District of Maryland, against the alleged bankrupt, a suit in admiralty based upon an alleged breach of Charter Party, and in that proceeding secured an attachment against a large amount of coal held by the Tidewater Coal Exchange at Baltimore, to the credit of the alleged bankrupt. This coal was sold by agreement of all the parties to the admiralty proceeding and the money realized therefrom, amounting to \$110,000.00 in cash, is impounded by the United States District Court for the District of Maryland, pending the final determination of this case.

3. On November 27, A. D. 1920, the alleged bankrupt deeded to one Charles S. Chestnut, of Philadelphia, all of its coal lands, mining properties, and personal property located in West Virginia. (Record, pp. 344, 358 and 374.) The said Charles S. Chestnut thereafter, on January 27, A. D. 1921, deeded the same properties to the Barbour-Lewis Coal Company, a corporation formed under the laws of West Virginia. (Record, p. 366.) On the 25th day of February, A. D. 1921, within four months from the date of the said writ of attachment, and also within four months from the date of the execution and recording of the said

deeds, the Pittsburgh & West Virginia Coal Company, H. M. Crawford Coal Company, and Boulder Coal Company, creditors of the alleged bankrupt, filed in the United States District Court for the Southern District of New York, an involuntary petition in bankruptcy against it, and alleged in the petition that the transfers above referred to were made while the alleged bankrupt was insolvent for the purpose of preferring certain creditors who are named in the petition, leaving the petitioning creditors and other creditors of the same class unpaid. Thus preferring the claims of those who obtained the benefit of the preferential deeds, over the petitioning creditors and other creditors of the same class.

A few days after the filing of said involuntary petition, John B. Johnson, Esq., a member of the New York Bar, was, by the United States District Court for the Southern District of New York, appointed receiver of the alleged bankrupt in this cause. Subsequently Judge Pritchard (then Presiding Judge of the Fourth Judicial Circuit) appointed W. H. Cochrane ancillary receiver for the property of the alleged bankrupt located within the jurisdiction of the United States District Court for the Northern District of West Virginia.

On the 3d day of March, A. D. 1921, the alleged bankrupt filed an answer to the petition, denying the act of bankruptcy and its insolvency. On the 19th day of September, A. D. 1921, the Morgantown Coal Company, a corporation, and Law & McCue, a firm of practicing lawyers of Clarksburg, West Virginia, by leave of the Court, filed intervening petitions as creditors of the alleged bankrupt and joined in the original petition.

On the 30th day of September, A. D. 1921, the op-

posing creditors, the petitioners here to wit, Canute Steamship Company and Compania Naviera Sota y Aznar, by leave of the Court, filed an answer claiming they are creditors of the alleged bankrupt and denying the allegations in the original and intervening petitions.

4. The case was tried in the United States District Court for the Southern District of New York and concluded on the 1st day of February, A. D. 1922, Judge Augustus N. Hand presiding. When the case was called and before other proceedings were had, a member of the New York Bar appeared in Court and presented a certified copy of resolutions passed by the Board of Directors of the alleged bankrupt, assented to in writing by all of its stockholders, authorizing its attorney to withdraw its answer and all opposition to its adjudication as a bankrupt.

The case then proceeded upon the issues alone raised by the answer of the two attaching opposing creditors (the petitioners here). As a result of the trial an order of adjudication in bankruptcy was entered by Judge Hand. (App. p. 409.) From this order an appeal was taken by the opposing creditors (the petitioners here) to the United States Circuit of Appeals for the Second Circuit, which Court by its decision sustained the order of adjudication. (Opinion by Judge Hough, App. p. 431.)

From the judgment of the Circuit Court of Appeals the opposing creditors (the petitioners here) applied to this Honorable Court for a writ of certiorari to the said Circuit Court which was granted, and the case is now here for final determination.

OUTLINE OF ARGUMENT

This case was ably tried by the District Court, Augustus N. Hand, District Judge, presiding. He gave the opposing creditors the widest latitude to produce evidence sufficient to convince the Court that an order of adjudication in bankruptcy should not be granted at the conclusion of the trial but after holding the case for some days for consideration, the District Judge entered the order of adjudication and in the opinion (App. page 409) found that all of the creditors who signed the original petition had valid claims. The objection raised by the opposing creditors to the validity of the claim of the Pittsburgh and West Virginia Coal Company was not sustained by the District Judge, but on the other hand his opinion is to the effect that the claim of that creditor is entirely valid.

The evidence establishes beyond all question that at the date the petition was filed the alleged bankrupt was hopelessly insolvent. Its total available assets were less than \$250,000, while its indebtedness approximated \$1,000,000, or more. The testimony of Gardiner Yerkes, Secretary-Treasurer of the alleged bankrupt (page 158 of the record) is conclusive on this point. His testimony sets forth in detail the obligations of the alleged bankrupt and declares that at the time of the filing of the petition it was unable to meet its current obligations. However, the alleged bankrupt itself by resolutions duly passed by unanimous vote of its directors and assented to in writing by all of its stockholders, authorized its counsel to appear in Court (which he did before the trial), and present the said resolutions to the Court in certified form authorizing its counsel to withdraw its answer theretofore filed, and to admit all of the allegations contained in the orig-

inal petition including the act of bankruptcy and insolvency.

In the absence of fraud or collusion between the petitioning creditors and the alleged bankrupt (and there was absolutely no mention of any such thing in the entire proceeding) the strongest possible evidence as to the Act of Bankruptcy and the insolvency of the alleged bankrupt is its own admission, made by its counsel in open court when he withdrew his client's answer. The answering creditors who object to the adjudication in bankruptcy and who are the petitioners here, cannot possibly supply evidence that would impeach these admissions of the alleged bankrupt itself and especially when coupled with the testimony of its officers given in open court at the trial before Judge Hand.

In addition to the admissions of the alleged bankrupt and its officers, the testimony of each one of the creditors whom it is charged were preferred was taken (see Record testimony), and each one of them testified that the purpose of the preferential transfer of the coal properties in West Virginia was for the purpose of protecting and securing them as to large amounts of money due them from the alleged bankrupt. In other words, the testimony of the preferred creditors themselves, freely given, establishes the fact that all of the coal property of this alleged bankrupt, which was all the property it had except book accounts and personal property, was transferred to an individual—one Charles S. Chestnut, of Philadelphia, for the purpose of retransferring the same property to a coal corporation formed under the laws of the State of West Virginia, which was owned entirely by these preferred creditors and which was organized for the purpose of

taking over these coal properties for the benefit of the preferred creditors. This is all entirely and completely admitted by the alleged bankrupt itself, and by the preferred creditors, and is not denied from any source whatever.

The contention raised by the answering objecting creditors that the Pittsburgh and West Virginia Coal Company, one of the creditors who signed and swore to the original petition, did not have a valid claim, is entirely refuted by the evidence and by the judgment of the District Judge, who tried the case. The facts disclosed at the trial by oral testimony and by documentary evidence is to the effect that this creditor received through a brokerage house in Philadelphia,—who was authorized to purchase coal for the alleged bankrupt,—an order for fifteen cars of coal to be consigned to the Diamond Fuel Company, the alleged bankrupt, at Curtis Bay Piers, Baltimore, Md., to be there loaded on vessels and exported to Europe. The evidence is to effect that this corporation, the alleged bankrupt, was at that time engaged in purchasing coal on a very large scale and exporting the same to Europe. This was in the year of 1920, shortly after the close of the World War. At that time there was an enormous demand for coal in Europe, which induced a large number of coal companies to engage in the business of exporting coal, and as a result prices advanced to unheard of figures for coal at the mine. The order was received by the Pittsburgh and West Virginia Coal Company for the fifteen cars of coal on the 29th of October, 1920. By mistake at the mine from which the coal was ordered shipped, thirty-three cars of coal were shipped in one shipment instead of fifteen. In other words, the order was overshipped by eighteen

cars. The brokerage firm in Philadelphia which ordered the shipment of the fifteen cars refused to pay for the excess of eighteen cars. The coal, however, went forward in one complete train load. It was all received at the Curtiss Bay Piers at the same time and was credited by the Tidewater Coal Exchange to the Diamond Fuel Company, the alleged bankrupt. The coal was promptly dumped and of course mingled with other coal consigned to the alleged bankrupt. It was a matter of several weeks after this mistake had been made before it was discovered that the order had been overshipped to the amount of eighteen cars. Officers of the Pittsburgh and West Virginia Coal Company brought the matter to the attention of the Diamond Fuel Company, the alleged bankrupt, and they checked up the coal received through the Tidewater Coal Exchange at Curtis Bay Piers and found that this coal had actually been delivered to it and that it had actually received and used it. Thereupon, the question of the payment for the same came up. The Diamond Fuel Company, the alleged bankrupt, agreed to pay for it, but there was a dispute as to the price it was willing to pay. That Company offered \$5.00, whereas the Pittsburgh and West Virginia Coal Company, the petitioner and creditor here, maintained that inasmuch as they had received the coal, had accepted it and used it in the same manner in which they used the fifteen cars that were actually ordered, that they should pay for it at the same price. While these negotiations were going on, it was brought to the attention of the Pittsburgh and West Virginia Coal Company, the petitioning creditor, that all of the coal to the credit of Diamond Fuel Company, the alleged bankrupt, in the Tidewater Coal Exchange, had been attached in an ad-

miralty proceeding brought in the United States District Court by the Canute Steamship Company and the Compania Naviera Sota y Aznar, who are the same steamship companies which are the answering objecting creditors in this proceeding. It was disclosed that this proceeding in admiralty was for a very large amount of money for demurrage and other charges against the Diamond Fuel Company, alleged bankrupt. The coal to the credit of the Diamond Fuel Company was by agreement of all the parties to this admiralty proceeding sold and converted into cash and the sum of \$110,000 was realized therefrom and the money was placed in the hands of a trustee by the Judge of the United States District Court for the District of Maryland and has ever since been impounded by the Court awaiting the outcome of legal proceedings.

This put the creditor, the Pittsburgh and West Virginia Coal Company, upon inquiry as to the financial condition of the Diamond Fuel Company, alleged bankrupt, and this investigation disclosed the fact that not only had this attachment in the admiralty proceeding in Baltimore been sued out and all of its liquid resources tied up thereby, but that the alleged bankrupt had actually entered into an arrangement with five or six of its largest creditors to which it owed several hundred thousand dollars, by which it deeded all of its coal mining properties to one Charles S. Chestnut, of Philadelphia, who in turn had deeded the same properties to a corporation known as the Barbour-Lewis Coal Company, which was newly formed for the purpose, and the only purpose, of taking over and holding title to these properties for the benefit of the preferred creditors before referred to. Thus on the one hand it was discovered that all of its liquid as-

sets were tied up by this attachment proceeding, while all of its physical properties had been transferred to a corporation organized by certain of its large creditors for the purpose of taking over the title to the properties to protect them in the amount of the obligations which the alleged bankrupt owed them. Upon discovering this condition of affairs, the Pittsburgh and West Virginia Coal Company placed its claim in the hands of counsel who proceeded with a further investigation and got in touch with the officers of the Diamond Fuel Company, the alleged bankrupt, with the result that no satisfaction could be obtained and finally a conference of creditors whose claims were put in jeopardy by these acts of the alleged bankrupt decided in order to protect their interests that it would be necessary to apply to the courts for the appointment of a receiver for the property and assets of the alleged bankrupt and this bankruptcy proceeding was begun in the United States District Court for the Southern District of New York on the 25th day of February, 1921, as a result.

THE LAW

The most important point of law involved in this case arises out of construction by the District Court and the Circuit Court of Appeals of Sec. 59f of the National Bankruptcy Act, viz:

“Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.”

The District Court in its opinion deciding the case, in part said:

"Moreover, intervening creditors with good claims have cured any defect in a petition which was sufficient on its face, and these creditors make the original petition valid from its inception, *if there was a defect in the claim of one of the original.*" (Italics ours.)

"The case is not like that of an original petition which was invalid on its face, in *Re Stein*, 105 Fed. 749; and in *Re Triangle Steamship Company*, 267 Fed. 300, is distinguishable upon this ground."

In deciding adversely to the opposing creditors their contention that one of the creditors which signed the original petition did not have a valid claim, the District Court, opinion by Judge Hand, is as follows:

"Only one of them, the Pittsburgh & West Virginia Coal Company, is said not to be a valid creditor. Its claim is for eighteen cars of coal shipped by mistake. * * * The objecting creditors attached this coal by process of foreign attachment in a suit in admiralty against the Diamond Fuel Company and sold it with other coal in that proceeding. I think it is too late, after taking such a step, to offer at the trial to release their attachment against the eighteen carloads, or their proceeds. They cannot restore the parties to their original position by returning the coal sold under process in admiralty, and the Diamond Fuel Company has never attempted to do this, and by withdrawing its answer has ratified the transaction so far as possible."

The Circuit Court of Appeals in its opinion by Judge Hough says:

"This unduly voluminous record presents but one point necessary for decision."

The point referred to in the foregoing quotation from the opinion of the Circuit Court of Appeals refers to another point decided by Judge Hand, namely: that two other creditors having undisputed claims had intervened, as they were entitled to do, under Section 59f of the Bankrupt Act.

Neither the District Court nor the Circuit Court considered it necessary to go beyond this one point. It was admitted at the trial, and is admitted in the petition of the opposing creditors to this Court, that at least four creditors having valid and undisputed claims had joined in the petition prior to the trial.

There was no demurrer interposed, and both the District Court and the Circuit Court found no objection to either the form or the substance of the original petition. On the contrary, the latter Court said in its opinion:

"But in this case the original petition was not jurisdictionally defective; it might fail for lack of proof of many things, e. g., that it was brought by three *bona fide* creditors. But it would have withstood a demurrer, and an unopposed adjudication based thereon would have been perfectly valid."

The three judges who heard and decided the case in the Circuit Court, and the trial judge, are unanimous in their decision upon the point of law involved. And the same point so decided in this case has likewise been decided by the same Circuit Court (2nd Cir.) in *Re Bolognesi*, 223 Fed. 771, where the rule was stated:

"A petition in involuntary bankruptcy, valid on its face, gives the court jurisdiction, and other creditors may, under the Bankruptcy Act July 1, 1898, c. 541, Sec. 59f, 30 Stat. 561 (Comp. St. 1913,

Sec. 9643), intervene, though by lapse of time they are barred from originating a proceeding, for their adoption of the original petition relates back to the date it was filed."

The same point was decided in *Re Stein*, 105 Fed. 749-51, Circuit Court of Appeals, Second Circuit. The Court, commenting upon the joinder of additional petitioning parties, said:

"And, even if imaginable cases of hardship may arise, the plain language of the act, authorizing creditors 'at any time' to join in the original petition, can not be disregarded."

The United States District Court for the District of Delaware decided the same question in *Re Mackey*, 110 Fed. 355, as follows:

"As insufficiency in the number of the petitioning creditors is not an incurable jurisdictional defect, by parity of reasoning insufficiency in the amount of provable claims of such creditors can not be held such a defect; for the bankruptcy act equally requires sufficiency in number and sufficiency in amount in order that the petition may be sustained. Clause 'f' was evidently intended to correct defects of either kind at any time during the pendency of the proceedings, whether before or after the expiration of four months from the alleged act of bankruptcy. This construction of the clause is in harmony with its language, is calculated to protect the interests of creditors, and involves no hardship to the defendant."

The United States District Court for the District of Arkansas, in *Re Mammoth Pine Lumber Company*, 109 Fed. 308, decided the same point in the following language:

"There is no pretense in the case at bar that the Ft. Smith creditors were sham creditors. When they filed this petition, they were acting in good faith, an antagonistic to the Mammouth Pine Lumber Company. So that on the face of the proceedings there can be no doubt, if the cases cited above are sound, the proceedings should stand, and the creditors who made themselves parties to the proceedings, after the expiration of the four months, should be taken into consideration in determining whether or not the necessary number of creditors and amount of indebtedness existed upon which the Mammouth Pine Lumber Company could be adjudicated a bankrupt."

In the Eighth Circuit the same question has likewise been settled in *Corwith Bank v. Haswell*, 174 Fed. 209 (C. C. A. 8th Cir.). There the Court held that an amendment to an involuntary petition in bankruptcy whereby other creditors intervene and join therein, relates back to the filing of the original petition and does not advance the date of the filing.

On page 210 the Court said:

"The contention is that, as the original petition was defective for want of parties, the adjudication on that petition as amended, and the order relating the amendment back to the date of the original petition, was erroneous. The importance of this contention for the bank rests in this: If the 'filing of the petition' within the meaning of section 60 of the bankruptcy act, concerning unlawful preferences, has relation to the filing of the original petition only, the preference which the bank received would be defeated because less than four months had then elapsed since it was given. If, on the contrary, it has relation to the filing of the amendment, as in this case, the preference would be protected, because more than four

months had then elapsed. *This contention is always untenable.* Section 60a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445) as amended by Act Feb. 5, 1903, c. 487, 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314), provide that:

'A person shall be deemed to have given a preference if being insolvent he has within four months before the filing of the petition * * * made a transfer of any of his property,' etc.

"The amendment as made in this case did not constitute 'the petition' within the meaning of Section 60. It did not by its terms purport to be a petition. It alleged no new act of bankruptcy. It consisted merely in striking out such allegations of the original petition and substituting such other allegations as were requisite to show the joinder of the necessary parties, authorized by Section 59d, and their status as creditors. The original petition then remained as if all the averments of the amendment had been bodily incorporated in it.

"Congress, by the provisions of Section 59, which seems to have been enacted to meet just such condition of things as is disclosed by this record, very manifestly intended, not that the original petition should be supplanted by the amendment there provided for, but that it might be supplemented by the joinder of other necessary creditors. This is made clear, not only by the provisions of subdivision 'd' but by the provisions of subdivisions 'e' and 'f' of the same section. They all contemplate the retention of the original petition as the pleading upon which subsequent proceedings should be had."

This opinion expressed by the Circuit Court of Appeals for the Eighth Circuit is in harmony with its opinion upon the same point of law in *Despres v. Galbraith*, 213 Fed. 190, *being the case cited by the pe-*

tioners here to show the diversity of opinion between the courts of the Second Circuit and the Eighth Circuit; but no such diversity of opinion exists, as is clearly shown by the language of the Court:

"It has been repeatedly decided by this Court that where a petition was defective merely, as for example, where a petition was filed by one creditor only who alleged that the debtor had less than twelve creditors known to him, and it was subsequently discovered that there were more than twelve creditors, and therefore the petition must be filed by more than one creditor, the requisite number of creditors might joint with the original petitioner prior to adjudication, and that in such case the 'filing of the petition' within the meaning of the Bankruptcy Act would relate back to the date of the filing of the original petition by the one creditor. (*First State Bank v. Haswell*, 174 Fed. 209, 98 C. C. A. 217, and cases there cited.)"

"The three creditors filing the first petition were absolutely disqualified from filing an involuntary petition in bankruptcy by reason of becoming voluntary parties to the assignment contract, as much so as if they had been strangers to the entire proceeding; and it would not be contended, we take it, by anyone that strangers—that is, parties having no claims against a bankrupt—could file a petition against him that would have any validity whatever. The reason given in the cases for denying to one who has become a voluntary party to an assignment contract the right to file an involuntary petition in bankruptcy, basing it upon the assignment as an act of bankruptcy, is that to permit him to do so would be to permit him to take advantage of his own wrong and enable the unscrupulous to entrap a person into involuntary bankruptcy; and it is for this reason that a person who has placed himself in that position is uni-

formly held to be estopped to set up an assignment for the benefit of creditors as a ground for adjudging the assignor a bankrupt. This rule does not in any degree tend to affect or defeat the object of the Bankruptcy Law, for as was said by Judge Taft in *Simonson v. Sinsheimer*, 95 Fed. 948, 37 C. C. A. 337:

'The estoppel we are considering, if recognized and enforced, does not affect or detract from the paramount character of bankruptcy proceedings, when properly begun, but only prevents the institution of such proceedings by persons who were privy to the act of which they complain and on which they found their prayer for an adjudication.'

Likewise the rule is clearly stated by the Court in *Robinson v. Hanway*, Fed. Cas. No. 11,953, as follows:

'But we are of the opinion that the original creditors' petition is void for want of proper petitioners, and did not give the Court jurisdiction of the case, and that the intervening petitions are also void for want of an original petition to give them force. It is not a case of amendment of a defective petition of which the Court has jurisdiction, and when the interveners perfect the petition by additional numbers and amounts. But it is an attempt to give life to a dead petition, to engraft branches upon a lifeless stock, and infuse vitality into it. The interveners must draw their support, if at all, from the original petition; but in this case the original petition is dead, and neither supports the interveners nor itself.'

In the case of *Trammell v. Yarborough*, 254 Fed. 685, the Court, in harmony with the other cases referred, said:

In this case an answer was filed by the alleged bankrupt, putting in issue the averments of insolvency and acts of bankruptcy, and averred a state of facts relied on as estopping the petitioners to maintain a proceeding. Subsequently other alleged creditors of Trammell filed an intervening petition, which was not acted on by the Court, and it was not served on, or answered, or pleaded to by Trammell. Still later on, another alleged creditor filed an intervening petition which the alleged bankrupt demurred to and answered. The District Court then made an order to the effect that:

‘The Intervention as filed by other creditors seeking adjudication, and the petitioning creditors and intervening creditors having failed to appear and prosecute their action, the case was heard upon the answer and demurrers of the alleged bankrupt, and it appearing that the petitioners and interveners have failed to prosecute their action and that the demurrers as filed by the alleged bankrupt are sufficient, it is therefore ordered that the above styled and numbered cause be dismissed at the cost of petitioning creditors and interveners, reserving, however, to any other creditors of the alleged bankrupt the right to intervene and have the matter reopened within thirty days, and in the event no other creditor of said alleged bankrupt so intervenes for said purpose, then this order for dismissal shall be final. It is further ordered that a copy of this order be published three consecutive days in a leading Dallas newspaper.’

“Within the thirty days’ time one Jack Yarborough and others filed a petition setting up the above-stated prior occurrences in the bankruptcy proceeding, and that petitioners were creditors in amounts stated, adopted the allegations of the

original previously filed intervening petitions in regard to the acts of bankruptcy and the insolvency of Trammell, and prayed that the above mentioned order dismissing the proceeding be set aside, and that the proceeding be reopened and the petitioners be permitted to intervene and that a hearing be had on the original and intervening petitions. To this latter petition Trammell demurred, and answered the petition, and prayed that the same be referred to a jury. The Court reopened the bankruptcy proceeding and permitted the petitioners in the last filed petition to intervene and join in the original petition, but referred the cause to a special Master in Chancery for a hearing upon issues of fact therein. This resulted in an adjudication of bankruptcy being made on the Master's report, and from that Trammell appealed.

The Court held:

"A revival of the proceeding at the instance of other creditors was not a joinder by them with those who previously had prosecuted the proceeding, because the latter had ceased to be actors in it. So far as they were concerned, the proceeding was not revived. They remained out of it. A reopening of the proceeding let to other creditors to carry it on after the elimination from it of all who previously had been actors, was in necessary effect the institution of a new proceeding."

The Court further held in that case that the language in paragraph 59f, Bankruptcy Act of July 1, 1898, presupposes the continued presence in the proceeding of petitioners with whom other creditors may join. It does not contemplate a revival of the proceeding after its life has been ended by the elimination of all who were actors in it; and the Court cites in *Re Bolognesi*, 223 Fed.

771. Circuit Court of Appeals, Second Circuit, in support of the doctrine that intervening creditors may join in a live petition where the joinder is with all or a part of the original creditors.

The opinion of the Court in that case continues in part as follows:

“While Bankruptcy Act, § 59f (Comp. St. § 9643), provides that creditors other than the original petitioner may at any time enter their appearance and join in the petition, yet, where a petition in involuntary bankruptcy is entirely dismissed, it is improper for the Court to reserve to other creditors the right to intervene and have the matter reopened, and where creditors attempted to intervene pursuant to such leave, such proceeding can not be deemed a continuation of the original one.”

In all of the foregoing cases the construction of Section 59f of the Bankrupt Act is in harmony with the opinion of the District and Circuit Court in the instant case, while the opinion in the case of *Despres v. Galbraith* is in harmony with Judge Hough's opinion in the case at bar upon the particular point of law involved, but in the *Despres* case the three original petitioners were parties to a general assignment made by the alleged bankrupt prior to the filing of the involuntary petition. The same three creditors having induced the alleged bankrupt to make the assignment and in consideration thereof having expressly released him from their debts, afterwards filed the involuntary petition against him. The Court held as a matter of fact that no one of the three were valid petitioners, or had any claim at all against the alleged bankrupt, therefore the proceeding itself from the be-

ginning had no validity; but at the same time while determining this fact decided the point of law involved in this case as it has been decided by the Circuit Court of Appeals, Second Circuit, in the case at bar.

A careful examination of the cases where this section of the Bankrupt Act has been construed indicates entire uniformity in expression, and opinion, upon this point of law. Counsel for respondents have made a careful examination of the decisions of both the District and Circuit Courts, and have found nowhere any opinion which conflicts with those quoted. We feel justified in saying that Section 59f, according to the strictest canon of construction, can have no other meaning except that creditors other than the petitioning creditors having valid claims against an alleged bankrupt, may at any time intervene and join in the original petition in any proper case. And this theory of the law is not only supported by the decisions of the courts, but as well by the text writers; and it seems likewise to be the almost universal opinion of the legal profession.

The National Bankrupt Act being remedial, its provisions are liberally construed with a view to carrying into effect its obvious purposes and intent, to the end that a debtor who has been unfortunate and become unable to pay his debts may be released therefrom and commence his business life anew, and his property applied equitably and ratably to the payment of his debts. Moreover, it has been the settled practice of the courts to construe the act in the most liberal manner compatible with principles of law and equity, to the end that its purpose may be fulfilled in a prompt and efficient administration of the estates

which come within the jurisdiction of the bankruptcy courts, by pleadings regularly filed, and where other provisions of the act are complied with.

The judgment of the court below should be affirmed.

THOS. F. BARRETT,
Attorney for Respondents.

NASH ROCKWOOD,
R. H. McNEILL,
R. R. BENNETT,
TRACY L. JEFFORDS,
Of Counsel for Respondents.

Affirmed.

CANUTE STEAMSHIP COMPANY, LTD., ET AL. v.
PITTSBURGH & WEST VIRGINIA COAL COM-
PANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.

No. 72. Argued October 12, 15, 1923.—Decided November 12, 1923.

Under the Bankruptcy Act §§ 3b, 59b, 59f, where a petition for involuntary bankruptcy, filed by three petitioners, is sufficient on its face, alleging that they are creditors with provable claims, and containing all averments essential to its maintenance, other creditors having provable claims who intervene in the proceeding and join in the petition at any time during its pendency before an adjudication is made, after as well as before the expiration of four months from the alleged act of bankruptcy, are to be counted at the hearing in determining whether there are three petitioning creditors qualified to maintain the petition, it being immaterial in such case whether the three qualified creditors joined in the petition originally or by intervention. P. 247.

283 Fed. 108, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming an adjudication of bankruptcy made by the District Court.

Mr. Charles R. Hickox, with whom *Mr. D. M. Tibbetts* was on the brief, for petitioners.

Mr. Thomas F. Barrett and *Mr. Theodore Kiendl*, with whom *Mr. John W. Davis*, *Mr. Nash Rockwood*, *Mr. R. H. McNeill*, *Mr. R. R. Bennett* and *Mr. T. L. Jeffords* were on the briefs, for respondents.

Mr. Bernard S. Barron filed a brief for the receiver in behalf of general creditors.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case involves an adjudication in bankruptcy made under an involuntary petition which was opposed by intervening creditors.

In February, 1921, three of the respondents, the Pittsburgh & West Virginia Coal Company and two other coal companies, filed in a Federal District Court in New York a petition for the involuntary bankruptcy of the Diamond Fuel Company, alleging that it was insolvent and had committed an act of bankruptcy within four months prior thereto, and that they were creditors having provable claims against it. The petition was regular and sufficient on its face. The Fuel Company answered, denying that it was insolvent or had committed an act of bankruptcy, or that the Pittsburgh Company, one of the petitioners, was its creditor and had a provable claim against it.

In September, 1921, more than nine months after the date of the alleged act of bankruptcy, before any further proceedings had been had other than the appointment of a receiver, two other creditors of the Fuel Company by leave of the court intervened in the proceeding and joined as

petitioning creditors in the petition for bankruptcy. Eleven days thereafter the present petitioners, the Canute Steamship Co., Ltd., and Compania Naviera Sota Y Aznar, hereinafter called the opposing creditors, being creditors of the Fuel Company claiming to have acquired a lien upon its funds by attachment proceedings instituted within four months before the filing of the original petition, by leave of the court likewise intervened in the proceeding in opposition to the petition for bankruptcy, and filed answers denying its averments in like manner as in the answer of the Fuel Company.

On the hearing before the District Court on pleadings and proof, the Fuel Company withdrew its answer and consented to an adjudication. The case was then heard on the issues raised by the answers of the opposing creditors. The District Judge, intimating, but not determining, that by reason of certain matters not necessary to be recited, the opposing creditors were estopped from denying that the Pittsburgh Company was a creditor, held that, independently of this question, any defect of parties which might otherwise have resulted was cured by the joinder of the two intervening creditors having valid claims; and, finding that the allegations of the petition for bankruptcy were otherwise sustained by the proof, an order was entered adjudging the Fuel Company a bankrupt. Upon appeal by the opposing creditors, the Circuit Court of Appeals, assuming, but not deciding, that the Pittsburgh Company was not a creditor, nevertheless affirmed the order of adjudication on the ground that the question of its claim was immaterial in view of the joinder of the intervening petitioners supplying the requisite number of creditors. 283 Fed. 108.

The opposing creditors contend that this was error upon the ground that under the provisions of the Bankruptcy Act (30 Stat. 544), the petition in bankruptcy could not properly be sustained except upon a finding that the Pitts-

burgh Company was a creditor of the Fuel Company having a provable claim against it, so as to make up the required number of three original petitioners entitled to maintain the petition; and that, in the absence of such finding, this lack could not be cured by the joinder of the other petitioning creditors more than four months after the commission of the act of bankruptcy.

The pertinent provisions of the act are these: Section 3b provides that a petition may be filed against a person who is insolvent and has committed an act of bankruptcy within the preceding four months; § 59b, that three or more creditors who have provable claims against any person of a specified aggregate amount—or if all the creditors of such person are less than twelve in number, then one of such creditors whose claim equals the specified amount—may file a petition to have him adjudged a bankrupt; and § 59f, that “Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.”

It was not averred in the petition for bankruptcy that the creditors of the Fuel Company were less than twelve in number; nor is this claimed. And no question is made as to the aggregate amount of the claims involved.

The argument in behalf of the opposing creditors is, in effect, that under § 3b a petition for involuntary bankruptcy must be filed within four months after the commission of the act of bankruptcy; that under § 59b, unless the creditors are less than twelve in number, to give the court jurisdiction the petition must be filed by not less than three creditors having provable claims; and that where less than three of the original petitioners are in fact such creditors, the joinder in the petition more than four months after the commission of the act of bankruptcy of intervening creditors having such claims, is in substance an amendment of the original petition, equiva-

lent to the filing of a new petition, which does not validate the original petition *ab initio* or authorize an adjudication of bankruptcy to be made under it based upon an act of bankruptcy committed more than four months before the requisite number of creditors entitled to maintain it had become petitioners.

However, the filing of a petition, sufficient upon its face, by three petitioners alleging that they are creditors holding provable claims of the requisite amount, the insolvency of the defendant and the commission of an act of bankruptcy within the preceding four months, clearly gives the bankruptcy court jurisdiction of the proceeding. *Re New York Tunnel Co.* (C. C. A.), 166 Fed. 284, 285; *Re Bolognesi* (C. C. A.), 223 Fed. 771, 772. And while, under § 59b, as held in *Cutler v. Ring Co.* (C. C. A.), 264 Fed. 836, 838, it is indispensable to the maintenance of the petition that the existence of three petitioners holding provable claims be established, if challenged, the argument in behalf of the opposing creditors erroneously assumes that these must be three original petitioners, and fails to give due weight to the plain provisions of § 59f supplementing and modifying the provisions of § 59b in this respect. Section 59f provides in unambiguous language that creditors other than the original petitioners may "at any time" enter their appearance and "join in the petition." The right thus conferred is not limited to the period of four months after the commission of the act of bankruptcy alleged in the petition, either expressly or by implication; the only limitations as to point of time being those necessarily implied, that, on the one hand, the petition cannot be joined in after it has been dismissed and is no longer pending, and that, on the other hand, it must be joined in before the adjudication is made. Such intervention by other creditors is not an amendment to the original petition or equivalent to the filing of a new petition, but is, in the specific language of the act, a

"joining in" the original petition itself. And other creditors thus joining in the original petition necessarily acquire the status of petitioning creditors as of the date on which the original petition was filed, and may thereafter avail themselves of its allegations, including those relating to the commission of the act of bankruptcy, as fully as if they had been original petitioners.

We therefore conclude that where a petition for involuntary bankruptcy is sufficient on its face, alleging that the three petitioners are creditors holding provable claims and containing all the averments essential to its maintenance, other creditors having provable claims who intervene in the proceeding and join in the petition at any time during its pendency before an adjudication is made, after as well as before the expiration of four months from the alleged act of bankruptcy, are to be counted at the hearing in determining whether there are three petitioning creditors qualified to maintain the petition, it being immaterial in such case whether the three qualified creditors joined in the petition originally or by intervention.

The decisions in the Circuit Courts of Appeals and District Courts are to this effect: *Re Stein* (C. C. A.), 105 Fed. 749; *Re Bolognesi* (C. C. A.), *supra*, p. 773; *Re Romanow* (D. C.), 92 Fed. 510; *Re Mammouth Lumber Co.* (D. C.), 109 Fed. 308; *Re Mackey* (D. C.), 110 Fed. 355; *Re Charles Town Light Co.* (D. C.), 183 Fed. 160. And see *Re Plymouth Cordage Co.* (C. C. A.), 135 Fed. 1000; *Stevens v. Mercantile Co.* (C. C. A.), 150 Fed. 71; *Ryan v. Hendricks* (C. C. A.), 166 Fed. 94; *First State Bank v. Haswell* (C. C. A.), 174 Fed. 209; *Re Etheridge Furniture Co.* (D. C.), 92 Fed. 329; *Re Bedingfield* (D. C.), 96 Fed. 190; *Re Gillette* (D. C.), 104 Fed. 769; *Re Vastbinder* (D. C.), 126 Fed. 417; and *Re Crenshaw* (D. C.), 156 Fed. 638. The cases of *Despres v. Galbraith* (C. C. A.), 213 Fed. 190, and *Trammell v. Yarbrough* (C. C. A.), 254 Fed. 685, upon which the opposing credi-

tors chiefly rely, are clearly distinguishable in their essential aspects. In the *Despres Case* the original petition had been dismissed and the intervening creditors did not join in it but filed a new petition; and, despite the somewhat broad language used in the opinion, it was obviously not intended to modify or overrule the prior decision of the same court in *First State Bank v. Haswell*, *supra*, which was cited with approval (p. 192). And in the *Trammell Case* other creditors were not permitted to reopen a proceeding in which the original petition had been dismissed, as being not an intervention in a pending proceeding but the institution of a new one.

The question, upon which the decisions show a conflict of opinion, as to the joinder of an intervening creditor in an original petition insufficient upon its face, is not here involved and is not determined.

Finding, for the foregoing reasons, no error in the decree of the Circuit Court of Appeals, it is

Affirmed.